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# APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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No. 91-55365

D.C. No. CV 89-1522-JGD

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ELLEN BRASWELL,

Plaintiff-Appellant,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Defendant-Appellee.

---

Appeal from the United States

District Court for the

Central District of California

John G. Davies, District Judge, Presiding

---

Submitted February 4, 1993[*]

Pasadena, California

Filed February 11, 1993

**MEMORANDUM**[**]

Before: PREGERSON, LEAVY, and TROTT,
Circuit Judges.

On January 8, 1990, the appellant, a black school teacher, filed a third amended complaint against the Los Angeles Unified School District ("school district"), alleging claims of race and sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Secs.

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[*] The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

[**] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3

2000e et seq., and 42 U.S.C. Secs. 1981 and 1983. The school district moved for summary judgment. The appellant's counsel withdrew shortly before the hearing on the motion, filing a declaration with the district court as to why she withdrew. The appellant proceeded pro se.

Because of the appellant's pro se status, the court granted numerous continuances and repeatedly informed the appellant in writing and orally prior to the hearing on the motion for summary judgment that the materials she had provided thus far were deficient to show that genuine issues of fact remained for trial.

The issues on appeal are: (1) whether the district court properly applied Federal Rule of Civil Procedure 56(e); (2) whether the court abused its discretion in denying the appellant a court-appointed attorney; (3) whether the district court's denial of appellant' request of additional discovery was an abuse of discretion; and (4) whether the district court's ruling that appellant could not amend her third amended complaint was an abuse of discretion.

1. Whether the District Court Erred in Its Application of Rule 56(e)

The appellant argues that the district court was obligated to examine the entire record to determine if there was a genuine issue of material fact.

We have held that a court's duty to sift through the record to determine if there are genuine issues of fact (especially where there is no reference to pertinent exhibits) is limited by the promulgation of a local rule. Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec, 854 F.2d 1538, 1545 (9th Cir. 1988) (per curiam) ("Hydrolec").

Hydrolec, like this case, was filed in the Central District of California, where Local Rules 7.14.2 and 7.14.3 govern the requirements for plaintiffs and defendants in summary judgment motions. Under these local rules, there is "an affirmative burden to list genuine issues with appropriate record citations in order to withstand the motion for summary judgment." Id. Consequently, we held that

> when a local rule such as United States District Court-Central District of California Rule 7.14.3 has been promulgated, it serves as adequate notice to nonmoving parties that if a genuine issue exists for trial, they must identify that issue and support it with evidentiary materials, without the assistance of the district court judge.

Id. (emphasis added). In other words, "the law of this circuit...recognizes that a district court is under no obligation to mine the full record for issues of triable fact." Schneider v. TRW, Inc., 938 F.2d 986, 990 n.2 (9th Cir. 1991) (citing Hydrolec, 854 F.2d at 1545).

Therefore, neither the district court nor this court need sift through the record, particularly where appellant was warned that her opposition was deficient for failure to contain facts. See Hydrolec, 854 F.2d at 1545 (trial court warns party that its opposition was insufficient). Despite every latitude the court provided, the appellant followed neither the local rules, of which she was aware (see ER 1 at 214), nor the court's specific instructions to produce facts.

Where the district court gave the appellant every benefit, the latitude to ignore formalities on the part of a pro se plaintiff does not extend to a complete failure to comply with the rules and the court's instructions. We affirm the district court on the sole ground that Local Rule 17.14.3 "serves as an adequate notice to nonmoving parties that if a genuine issue exists for trial, they must identify that issue and support it with evidentiary materials, without the assistance of the district court judge." Hydrolec, 854 F.2d at 1545.[1]

2. Whether the District Court Erred in Denying the Request for Additional Discovery

The appellant argues that she could not obtain important evidence for her case because the court denied her request for additional discovery. A district court's discovery rulings are reviewed for an abuse of discretion. United States v. Mandel, 914 F.2d 1215, 1219 (9th Cir. 1990).

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[1] Simply by reading the defendant's motion, which identifies precisely the material facts and gives record citation, this articulate, educated appellant should have been able to identify disputed facts and provide references to the record, if any.

The appellant filed a motion to served additional interrogatories on November 13, 1990, only two weeks before the rescheduled hearing on summary judgment on November 26, 1990. She did not file an affidavit to show that she could not present facts essential to justify her opposition as required by Rule 56(f). In view of the fact that there already had been a substantial passage of time and numerous continuances in deference to the appellant's status, we conclude that the district court did not abuse its discretion in denying additional interrogatories.

### 3. Whether the District Court's Denial of the Request for a Court-Appointed Attorney Was an Abuse of Discretion

The appellant argues that the district court should have appointed her counsel. A district court's decision on a motion for appointment of counsel is reviewed for an abuse of discretion. Bradshaw v. Zoological Soc. of San Diego, 662 F.2d 1301, 1318 (9th Cir. 1981).

There are three factors a district court must weigh in its decision whether to appoint counsel: (1) the plaintiff's ability to pay; (2) the efforts plaintiff makes to secure counsel; and (3) whether the claim has merit. Bradshaw, 662 F.2d at 1318. The district court recognized that plaintiff alleged she could not afford counsel and that she had made diligent efforts to find a substitute counsel. However, the court decided that, in the face of the defendant's motion for summary judgment and the evidence presented thus far in opposition to it, the appellant's claim lacked merit. We affirm the district court's ruling.[2]

### 4. Whether the District Court Erred in Denying Leave to Amend the Third Amended Complaint

The appellant argues that she wished to amend her third amended complaint to reinstate the claims of age discrimination, defamation, intentional infliction of emotional distress, and retaliation, which were first alleged in the first amended complaint. The claims were dropped from the second and third amended complaints by appellant's attorney after the court dismissed the first amended complaint for failure to state a claim under Rule 12(b)(6).

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[2] This court has held that an EEOC determination of "reasonable cause" is ordinarily sufficient to show a plaintiff's case has merit. Bradshaw, 662 F.2d at 1319-20. However, Bradshaw did not involve a summary judgment motion. Rather, it involved a reversal of a summary judgment motion on a Title VII and section 1983 action and a remand for further proceedings. Here, where appellant requested counsel when faced with a summary judgment motion, the question of merit is different from whether the pleadings are adequate to support a claim.

The denial of leave to amend after a responsive pleading has been filed is reviewed for an abuse of discretion. Texaco, Inc. v. Ponsoldt, 939 F.2d 794, 798 (9th Cir. 1991).

The Supreme Court allows dismissal of a pro se complaint for failure to state a claim only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Rizzo v. Dawson, 778 F.2d 527, 529-30 (9th Cir. 1985). The district court had ruled early in the case that the appellant could prove no set of facts in support of age discrimination, defamation, intentional infliction of emotional distress, and retaliation. It did not abuse its discretion, therefore, to dismiss a motion to reinstate the same claims.

AFFIRMED.

Stamped by: Cathy A. Catterson

Cathy A. Catterson
Clerk, U.S. Court of Appeals

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 89-1522-JGD

ELLEN BRASWELL,

Plaintiff,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Defendant.

Filed February 4, 1991

Entered February 7, 1991

## ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

On November 26, 1990, defendant's motion for summary judgment came on for hearing. Having reviewed and considered the papers and oral arguments presented by the parties, the Court hereby GRANTS defendant's motion. All other motions are hereby taken off calendar.

## FACTS

Plaintiff is black. She has been employed by the Los Angeles Unified School District as a teacher. She taught for 12 years at Polytechnic High School ("Polytechnic"), from 1974 to 1985. From 1983 to 1984, the plaintiff held the position of yearbook advisor but requested she be relieved of this position in 1984.[1] In 1985, the plaintiff unsuccessfully applied for the position of mentor teacher. In 1985, the plaintiff filed a complaint with the Equal Opportunities Employment Commission alleging discriminatory treatment on the basis of sex and race at Polytechnic.

In 1985, at her request, the plaintiff transferred to Granada Hills High School ("Granada") where she continues to teach. In 1986, the plaintiff applied for the positions of peer counselling director and teen line liaison director, but was rejected. The plaintiff held the position of school coordinator for the Teen Line Liaison program, which was the only school office in the program. In 1986, 1987, and 1988 the plaintiff applied for the office of in house dean at Granada. However, Jody Dunlap already held that position in 1985 and continued to do so through 1989. In 1988 Bob Weinberg and Loretta Duncan respectively were selected to serve as in house dean on a part time basis, and Jim Gwin was assigned to the position part time in the fall of 1989. In 1990, Gwin was selected to serve as in house dean on a full time basis. The plaintiff unsuccessfully ran for the office of English

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[1] In some instances, the parties have only provided the Court with approximate dates. The dates specified in this order reflect this deficiency.

Department Chairperson in 1986. She also ran for representative to the School Site Council but was not elected. She took illness leave in Spring 1987 and academic years 1988-89 and 1989-90. She is presently on illness leave.

On October 25, 1988, the plaintiff amended her EEOC complaint alleging that discrimination against her due to her race and sex continued at Granada.

On March 14, 1989 the plaintiff filed a complaint for monetary and injunctive relief based on age, sex, and race discrimination against the Los Angeles Unified School District ("District"). Without having served the original complaint on the District, the plaintiff filed the first amended complaint May 30, 1989. This complaint asserted claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. sec. 2000e et seq, 42 U.S.C. section 1981, and 42 U.S.C. section 1983, intentional infliction of emotional distress and defamation. On September 12, 1989 the Court dismissed the first amended complaint for failure to state a claim, pursuant to Fed.R.Civ.P. 12(b)(6).

On September 29, 1989, the plaintiff filed a second amended complaint. In this complaint the plaintiff dropped her age discrimination claim and her pendent state claims, but realleged causes of action under Title VII and sections 1981 and 1983. On December 18, 1989, the Court granted the District's 12(b)(6) motion to dismiss the section 1983 claim. On January 8, 1990, the plaintiff filed a third amended complaint, alleging claims under Title VII and sections 1981 and 1983. The plaintiff alleges that the district discriminated against her by denying her requests to serve in various pre-administrative positions, her requests to transfer and her requests to teach honors classes, on the basis of plaintiff's race and sex. The plaintiff claims that the District discriminated against her by denying her applications to preadministrative positions. Denial of these preadministrative positions prevented the plaintiff from getting the experience necessary to pass the qualifying test for principal, assistant principal and dean, secondary. The plaintiff contends that these arbitrary selections policies denied her constitutional due process, violating section 1983.

The plaintiff claims she wa denied the position of mentor teacher in favor of a white male in the 1985-86 school year. In 1986, plaintiff states she initiated a program on peer counselling, but the position of director went to a white male.

Plaintiff contends she was also denied the positions of teen line liaison director and test coordinator in 1986. Plaintiff also asserts that she was denied the assignment of honors classes, the ability to serve as the chairperson of the English Department and to serve as representative to the School Site Council due to her race. The latter two positions were filled by popular election pursuant to the collective bargaining agreement between the District and United Teachers of Los Angeles ("UTLA"). The plaintiff argues that denial of preadministrative positions was part of a District policy to prevent minorities and women from gaining the requisite administrative experience to be promoted to principal, assistant principal, or dean, secondary. The plaintiff makes further allegations under section 1981.

The defendant filed this motion for summary judgment on all claims, July 23, 1990. However, on or about August 6, 1990, the plaintiff's attorney withdrew. Since that time, the plaintiff has proceeded pro se. In order to allow plaintiff time to prepare an opposition to the pending motion the Court has granted numerous continuances. The plaintiff has now filed an opposition to the motion for summary judgment and exhibits in support of her opposition.

## DISCUSSION

### THE STANDARD FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56(e), "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings...[T]he adverse party's response must set forth specific facts showing that there is a genuine issue for trial." Where the nonmoving party bears the burden of proof at trial on a dispositive issue, Rule 56(e) requires the non-moving party to go beyond the pleadings and by his or her own affidavits, or by depositions, answers to interrogatories and admissions, designate issues of fact in dispute. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2553 (1986). To defeat a summary judgment motion, evidence must exist upon which a jury could reasonably find for the opposing party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 2512 (1986) ("Anderson").

A court must consider evidence presented in a summary judgment motion in the light most favorable to the opposing party. Id. at 2513. However, just as evidentiary facts are required to support a summary judgment motion, conclusory denials are insufficient to defeat summary judgment. Falls Riverway Realty, Inc. v.

Niagara Falls, 754 F.2d 49 (2d Cir. 1985). The Ninth Circuit has held that a party opposing a summary judgment motion cannot rest on its pleadings to carry its burden; in the absence of specific facts, as opposed to allegations, showing the existence of genuine issues for trial, a properly supported summary judgment motion should be granted. Nilsson, Robbins et al. v. Louisiana Hydrolec, 854 F.2d 1538 (9th Cir. 1988). Moreover, the Ninth Circuit stated that the Central District's Local Rule requiring a Statement of Genuine Issues in Dispute puts parities on notice that a party opposing a summary judgment motion must identify any issue remaining for trial. Id. at 1545. Mere unsubstantiated and conclusory allegations are insufficient to defeat a defendant's evidentiary showing under Fed. R. Civ. P. 56(e). Mitchel v. General Electric Co., 689 F.2d 877, 879 (9th Cir. 1982).

When a rational trier of fact could not find for the nonmoving party based on the record as a whole, there are no triable issues. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 1356 (1986). Summary judgment will not be defeated simply because issues of motive or intent are involved, and is proper when the plaintiff fails to indicate any motive or intent to support plaintiff's position. Morgan v. Harris Trust and Sav. Bank of Chicago, 867 F.2d 1023 (7th Cir. 1989).

A court should take proper care, however, to read a plaintiff's pleadings and motions liberally when pro se complaints are involved. Haines v. Kerner, 404 U.S. 519, 520-21, 92 S.Ct. 594, 595-96 (1972); Bullock v. Sweeney, 644 F.Supp. 507, 508 (N.D. Cal. 1986), aff'd 823 F.2d

554.

In this case, while initially represented by counsel, the plaintiff is now pro se. The Court instructed the plaintiff as to what her opposition to the motion for summary judgment must encompass, and continued hearings on the motion for summary judgment for a total of fourteen weeks to allow her to prepare her opposition. The Court has afforded the plaintiff a latitude it would not have afforded an attorney. The plaintiff has now filed her opposition to the motion for summary judgment and exhibits in support thereof. Having considered these filings and attempted to liberally weigh the evidence in the plaintiff's favor, the Court GRANTS the motion for summary judgment. Therefore, the Court concludes the plaintiff has produced no convincing evidence to support her claims and thus has failed to carry the burden required to defeat the motion.

**TITLE VII CLAIM**

The plaintiff filed her complaint with the Equal Employment Opportunities Commission ("EEOC") on June 10, 1985, and amended that complaint October 25, 1988. Though some of the alleged discriminatory incidents fall outside the limitations period of Title VII[2], the Court may still consider those incidents due to the continuing nature of the alleged violations. The doctrine of continuing violation will apply when a plaintiff has attacked a discriminatory employment system or practice. Reed v. Lockheed Aircraft Corp.,

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[2] Title VII provides a statute of limitations. A charge of discrimination must be filed within 180 days of the alleged discrimination or within 300 days if there is a state compliance agency. 42 U.S.C. 2000e-5(e). California has such an agency.

613 F.2d 757 (9th Cir. 1980). In applying this doctrine, the critical inquiry is whether any present violation exists. United Air Lines, Inc. v. Evans, 431 U.S. 553, 97 S.Ct. (1977). A plaintiff must be able to show a present and ongoing violation of constitutional rights to prevent claims from being time barred. If defendant practiced a policy of discrimination over an extended period of time, a court need only determine whether the plaintiff was exposed to discrimination during the limitations period. Williams v. Owens-Illinois, Inc., 665 F.2d 918 (9th Cir. 1982). In the instant case, the plaintiff has met this burden. The plaintiff alleges both in her EEOC complaint and in her pleadings that the District engaged in a systematic pattern of discrimination toward the plaintiff due to her race and sex. Though on sick leave, the plaintiff

is still an employee of the District. Thus any discriminatory system employed by the District continues to impact the plaintiff. Furthermore, the plaintiff produced evidence of the continuing nature of the alleged discrimination. On June 14, 1988, the plaintiff again unsuccessfully applied for the position of in house dean. Hence, the plaintiff has been adversely affected by the District's alleged policy within the limitations period.

Finding that the plaintiff's claims are not time barred, the Court must next address the merits of the plaintiff's allegations under 42 U.S.C. sec. 2000e *et seq*.

Title VII protects employees against employment practices which adversely affect an individual's status as an employee, because of the individual's race, color, religion, sex, or national origin.

42 U.S.C. sec. 2000e-2(a). Title VII in the relevant part provides: (a) It shall be unlawful employment practice for an employer

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin.
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way that would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Title VII precludes two kinds of discrimination. When an employer treats some employees less favorably than others, the discrimination is labeled "disparate treatment". Proof of discriminatory motive is critical, although in some situations it may be inferred from the mere fact of difference of treatment. The Supreme Court has found that disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 97 S.Ct. 1843 1977). The second type of discrimination concerns claims of disparate impact. This theory of discrimination involves employment practices which are facially neutral in their treatment of different groups but which in fact fall more harshly on one group and cannot be justified by business necessity or some other legitimate business justification. Proof of discriminatory motive is not required under a disparate impact analysis. Id.

In McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 1973) ("McDonnell-Douglas"), the Supreme Court established the basic allocation of burdens and order of proof in a Title VII case. First, the plaintiff must demonstrate a prima facie case of intentional discrimination by a preponderance of the evidence. Second, if the plaintiff succeeds, the burden of production shifts to the defendant to articulate legitimate, non-discriminatory reasons for its decisions. Third, if the defendant carries this burden, the plaintiff must then establish hat the reasons offered by the defendant were simply a pretext for discrimination. Id., 93 S.Ct. at 1825. While the burden of proving a prima facie case of disparate treatment is not onerous, the ultimate burden of persuading the trier of fact that a defendant intentionally discriminated against the plaintiff is at all times with the plaintiff. Texas Dept. of

Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093 (1981) ("Burdine").

In order to establish a prima facie case of discriminatory treatment, the plaintiff must show that she was treated less favorably than similarly situated employees. The plaintiff must also show that the defendant intended to discriminate. In the context of promotions the plaintiff must show that after having rejected the plaintiff's application for a promotion, the District continued to seek applicants with qualifications similar to the plaintiffs. Watson v. Fort Worth Bank and Trust, 108 S.Ct. 2777 (1988) ("Watson"). The plaintiff has in all respects failed. The District has articulated legitimate, nondiscriminatory reasons for its actions, and has produced convincing evidence of these non-discriminatory reasons. Three of the positions to which the plaintiff aspired were either not vacant or the plaintiff lacked the requisite qualifications. As to other positions or offices the plaintiff has not carried her burden of showing that the reasons offered by the District are merely pretexts for discriminatory decision making. Further, the plaintiff offers no evidence beyond conclusory allegations that the facially neutral selection criteria employed by the District pursuant to the collective bargaining agreement, has a discriminatory impact on minorities or women.

The plaintiff contends that the district arbitrarily and intentionally denied her appointments to pre-administrative positions because of her race. However, three of the positions to which the plaintiff lays claim were either not vacant during plaintiff's tenure of employment, or she did not actually apply to those positions. Furthermore, of the positions to which the plaintiff lays claim, the plaintiff held one, and did not apply for another position. The Court addresses these contentions below.

1. Youth Services Coordinator

The plaintiff claims that the District denied her application for the post of youth services coordinator while at Granada. However, while she may well have been qualified, the post of Youth Service Coordinator was not vacant during plaintiff's employment at Granada. Joe White is presently the youth services coordinator at Granada and was prior to the plaintiff's transfer to Granada. The District stated that since White continued to perform satisfactorily it had no reason to remove him from the position. (Declaration of Anne Falotico, principal of Granada, at 7). Since the position was not vacant, the plaintiff cannot make a prima facie case of discrimination.

2. Test Coordinator

The test coordinator provides planning and coordination for the subject content of various exams. Plaintiff asserts that she sought the position in 1986, but the District intentionally kept her uninformed as to when the meeting to elect the test coordinator would be held. A member of the committee finally told her late in the day that the meeting would be that day, after class periods ended, since it was the only time the committee could all meet. Plaintiff did not attend the meeting, claiming a previous engagement. The plaintiff did not remove her name from the eligibility list, but the committee appointed John Holodnik, a white male. The plaintiff has no knowledge of how or when the other candidates were notified of the time of the committee meeting. The plaintiff has no opinion as to whether Holodnik was better qualified than the plaintiff to hold the position of test coordinator. In fact, the plaintiff states that Holodnik may have more experience than the plaintiff because he assisted the previous test coordinator, Tom Griffin. (Deposition of the Plaintiff, vol. II, at 65-70).

### 3. Teen Line Liaison Director

The plaintiff contends she established the teen line liaison program in 1986. After she established the program the directorship was given to a white male. The teen line program is coordinated by Cedar Sinai Hospital and arranges presentations to students at different schools on a rotating basis. The only school position in the program was that of a contact person for Cedar Sinai Hospital at Granada. The principal of Granada appointed the plaintiff to that office in 1986. When the plaintiff went on leave in 1987, the principal appointed someone else to fill the position. Thus the plaintiff held the only available position while at Granada and present on the job. (Declaration of Falotico, at 11).

4. UTLA Council

Plaintiff contends that the District refused her appointment to the UTLA Council. However, no position by this name exists or could be identified by the plaintiff. (Deposition of Plaintiff, Vol II, at 7. See also, Declaration of Falotico, at 6).

### 5. English Department Chairperson and School Site Council

The plaintiff asserts that the District denied her appointments to be Chairperson of the English Department and representative to School Site Council. Both these offices were filled by popular election. The plaintiff contends that the voting method employed by the District discriminated against non whites.

The School Site Council is a decision making body made up by parents, teachers, the principal, and other school site personnel for the purpose of school improvement. Participants volunteer their time. School Site Councils adopt their own bylaws, including size and membership of the Council. Councils are established at schools that opted to participate in the

School Improvement Program. A School Site Council did not exist at Polytechnic. (Declaration of Lupe Sonnie, principal of Polytechnic from 1981 to 1983, at 4). A School Site Council did exist at Granada and the positions were filled by popular election. At Granada, the faculty elects five teachers to the School Site Council every year. The plaintiff does not state in any of her filings what years she ran for a position on the School Site Council. Furthermore, she makes no showing that she was personally discriminated against in running for the position. Finally the plaintiff makes no showing that minorities or women as a class were not elected to the School Site Council, or that the election process was tainted in any way.

English Department Chairperson is also a popularly elected office. This method of selection was determined by the collective bargaining agreement between UTLA and the District. Plaintiff has contends that due to the racial makeup of the individual schools, there were only two black English teachers among a faculty of fifteen at Granada, black teachers would have no chance to be elected.

To make a prima facie case under Title VII that a racially neutral policy or practice such as this has an impermissible discriminatory effect, the plaintiff must establish that the practice results in a disproportionate under representation of protected minorities. To establish disparate impact the plaintiff must show that there are more than statistical disparities in the employer's work force. The plaintiff must identify specific employment practices responsible for the disparities, and prove causation. Watson v. Fort Worth Bank and Trust, supra at

2786. The plaintiff fails in both respects.

The plaintiff presented no evidence indicating that only whites or men were popularly elected or that non whites or women were systematically not elected to, or even discouraged from applying for, these positions. The plaintiff merely identified a specific facially neutral practice and argued that it had a disparate impact on non whites. She offered no evidence of illegal disparities between the number of minorities and non minorities in the District's work force as a whole, nor in the elected positions. Thus, the plaintiff failed to make her prima facie case as to disparate impact under Title VII.

6. Honors Classes

The plaintiff also claims that the District did not assign her any honors classes to teach because of her race. The plaintiff was assigned and taught advanced courses at Polytechnic during the 1984-85 school year. The principal of Granada states that the plaintiff also had the opportunity to teach honors courses while at Granada, as did all teachers. (Declaration of Philip Nassief, at 4; Declaration of Sonnie, at 4; and Declaration of Falotico, at 11). The plaintiff was never actually assigned any honors classes at Granada, though she indicated her desire to teach them. She contends that white teachers with less experience were assigned honors classes. The plaintiff named five teachers in her deposition, but her opinion that those teachers were less experienced than she is based only on casual conversations. Since the plaintiff provides no evidence that less qualified whites were appointed to honors classes in preference to the plaintiff, she fails to establish a prima facie case of disparate treatment under Title VII.

7. Mentor Teacher

The plaintiff further contends that she was denied the position of mentor teacher during the period 1985-86 in favor of a white male rehired after retirement. No such position exists, however. The plaintiff appears to be confusing two positions. The retired mentor position is a separate program from the mentor teacher program. The retired mentor program is staffed by retired teachers to help new teachers for a maximum of 100 hours per semester. The position was created by specially designated funds from the District's Priority Staffing program specifically to hire retired teachers. The plaintiff was not retired teacher. She was not eligible for the position, even if she did in fact apply. The principal of Granada hired Don Schulz for the years 1985-86 and Mrs. Fishchli[3] for the years 1986-90, both retired, to fill the position. (Declaration of Falotico, at 8-9). Mentor teachers, on the other hand, are selected on a District wide basis by a Committee under Article XXVI of the collective bargaining agreement between the District and UTLA. Plaintiff states she applied to the principal for the position, but never applied at the District level, where the appointment would occur. Without having actually applied to the correct authority for the position, the plaintiff fails to make a prima facie case under Title VII.

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[3] Neither party provided the Court with Mrs. Fischili's first name.

8. Peer Counselling Director

Plaintiff claims that she was denied the position of peer counselling director. She claims she applied for the office of director in 1986. The peer counselling program is a group of student counsellors who seek to aid fellow students. A staff trainer must possess a pupil personnel credential. The principal appointed Dale Alpert who possessed such a credential. The plaintiff did not posses a credential. The other position associated with the peer counselling program is the position of teacher of the guidance class. The principal assigned Allan Kakassy to teach the guidance class because he showed intense interest and desire to be involved in the program. The principal informed the plaintiff that if she wanted to be involved she could volunteer to assist Kakassy. (Declaration of Falotico, at 8). The plaintiff did not volunteer.

In making a claim under Title VII, the burden of proof is always on the plaintiff. Burdine, supra. After the plaintiff has alleged intentional discrimination, the defendant may rebut such evidence by articulating non discriminatory reasons for its decision. If the defendant carries this burden the plaintiff must establish that the reasons offered by the defendant are a pretext for discrimination. McDonnell-Douglas, supra. In the instant case, the District appointed Alpert because of his particular credential. The District appointed Kakassy because of his intense interest in the program. The plaintiff, on the other hand, provides the Court with no evidence rebutting the District's professed nondiscriminatory motives for assigning both Kakassy and Alpert to the available positions with the peer counselling program. Mere allegations or denials of the District's evidence do not create a prima facie case or genuine issues of fact. Mitchel v. General Electric Co., supra.

9. School Transfers

Teacher initiated transfers are governed by the collective bargaining agreement between the District and UTLA. The District offers at least six kinds of transfer: voluntary transfer, general transfer, continuous service transfer, transfer to a magnet school, transfer to a year round school, and transfer to a school participating in the urban classroom teacher program ("UCTP").[4]

The plaintiff claims that the District denied her applications to transfer schools due to her race and sex. She contends that the District denied her repeated requests for school transfers to "schools within minority areas wherein she could obtain the requisite administrative qualifications." Plaintiff states that she repeatedly applied for a voluntary transfer and was repeatedly refused due to her race.

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[4] Since 1976, the Los Angeles School District has implemented a Teacher Staffing Integration Plan ("Plan") by order of the Office of Civil Rights. This plan establishes a teacher staff ratio based on the percentage of combined teacher minorities District wide. District schools must be within 15% of this annual ratio figure or are determined to be out of compliance. The district utilizes this ratio as guideline for school staffing. Through voluntary transfers of teachers schools seek to address ethnic imbalances. (Declaration Roberta Morris, Specialist in Teacher Integration Unit). The Third Circuit upheld this type of Plan in Kromnick v. School District of Philadelphia, 739 F.2d 894 (3rd Cir. 1984). The Third Circuit reviewed a voluntary policy of staff integration and held that although an overtly race conscious classification system might ordinarily signify a violation per se, applying a per se analysis to voluntary policies of staff integration designed to further the education of students of de facto segregated public school systems would be inconsistent with the intent of Congress underlying Title VII. Since this District employs alternative methods of transfer which are not governed by race conscious criteria for which the plaintiff would have been eligible, the Court does not reach the question of whether the race conscious classification is permissible.

Plaintiff appears only to have requested voluntary and general transfers during the period of 1983-85. The evidence indicates that the plaintiff at no time requested authorization to transfer to any other particular school. The principal who supervised plaintiff from 1983 to 1985 authorized plaintiff's voluntary transfer to Granada after the plaintiff had made various requests. (Declaration of Sonnie, at 5, and Memo to Pete Martinez from Albert Irwin, June 3, 1985, Declaration of Roberta Morris, at 3, stating that the district records indicate that for the period 1984-85, plaintiff applied for a general transfer in December 1984, a voluntary teacher integration program transfer, April 1985, and a general transfer/general exchange program transfer in April 1985. Records of transfers prior to that year have been destroyed as part of a regularly scheduled destruction process.) The plaintiff testified in her deposition that she never applied for a school transfer after her July, 1985 transfer to Granada. (Deposition of Plaintiff, Vol. III, at 48; See also Declaration of Falotico, at 9).

The District provided evidence to rebut the plaintiff's evidence that it deployed its transfer policy in a discriminatory manner. In 1985 the District granted the plaintiff's general transfer request. Evaluation by a Specialist in the Teacher Integration Unit for the District indicates that the plaintiff would have been eligible for various transfers other than those actually requested by the plaintiff during the period 1980-1990, however, the plaintiff failed to apply for any of these transfers. (Declaration of Morris, at 4). The plaintiff provided no evidence to show that non minorities were able to transfer more readily than the plaintiff, or that other types of transfers were unavailable to the plaintiff. Accordingly, the plaintiff fails to make a prima facie showing that she was treated less favorably than others due to her race.

### 10. Summary

The evidence produced in this motion establishes that the plaintiff was given opportunities to transfer between schools and to teach honors classes. Plaintiff has not shown that she or people of her race or sex were treated less favorably than others or that denial of administrative positions to her was in any way based on race. With two exceptions, all the positions that plaintiff claims were denied to her because of a policy of systematic discrimination were either not available during the periods the plaintiff was available to fill them, or the plaintiff actually held the position. She claims that the District's policy of maintaining racial parity among the schools' staff resulted in a situation where minority candidates were not elected to popularly elected offices. However, the plaintiff offered no evidence that other minority candidates were not elected. The plaintiff fails to meet her burden under the standard for summary judgment, by rebutting the District's showing of legitimate, nondiscriminatory motives for its actions.

Finally, the plaintiff argues that the denial of these preadministrative positions prevented her from gaining the experience necessary to pass the administrative portion of the test for principal, assistant principal, or dean, secondary. The plaintiff claims that denial of preadministrative positions to minorities and women is part of a district-wide policy to prevent women and minorities from attaining the positions of principal assistant principal and dean, secondary (now called assistant principal, student services). A review of the evidence presented, however, indicates that the plaintiff's contentions lack merit.

At the time the plaintiff took the promotional examinations, in 1981 and

1985, the promotional examination was a four step process. Applications were identified by number, so that during the promotional selection process there is no indication of the applicants race, sex, or age. Applicants were initially screened for education, experience, and credential qualification requirements. Qualified applicants then proceeded to the Training and Experience evaluation portion, where a committee reviewed the applicants skills in organization and management, communication, professional skills, human relations, academic preparation and professional experience. Successful candidates were then interviewed by the promotion committee. Qualified candidates made up the eligibility list. Hirings were made from this list as the need arose.

The plaintiff took the promotional examination for dean, secondary in 1985.

in that year, 263 applicants were initially screened. Of the applicants proceeding to the Training and Experience evaluation 25.6% were black and 56.2% were female. Of the applicants proceeding to an interview, 20% were black and 49.2% were female. Of the applicants on the final list of individuals eligible for promotion, 42.9% were female.[5]

The plaintiff took the promotional examination for assistant principal in 1981. In that year, 653 applicants were initially screened. Of the applicants proceeding to the Training and Experience evaluation 35.1% were black and 54.6% were female. Of the applicants proceeding to the interview, 25.9% were black, and 49.6% were female. Of the applicants on the final list of individuals eligible for promotion, 41.4% were female.[6]

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[5] The final statistics were compiled pursuant to a consent decree entered into by the District in 1981. The consent decree requires the District to obtain on each administrative promotional exam a qualified applicant pool containing at least 40% female applicants. If the applicant pool does not contain 40%, the District reinitiates the promotional examination in an effort to reach that figure. Szewiola, et al. v. LAUSD, Case No. CV 80-3348 WMB (C.D. Ca. 1981).

The District did not provide the Court with statistics for the number of black applicants who reached the final list of individuals eligible for promotion. This omission is not fatal. The plaintiff contends that she was denied the requisite preadministrative experience to pass the promotional exam. This lack of experience would screen the plaintiff out between the first stage and the Training and Experience stage of the promotional examination. At this stage of the screening process, the District provided statistics which indicate that the District's facially neutral employment practices do not fall more harshly on black or female applicants. Thus, the District effectively rebutted the plaintiff's claims that its policy of promotion disparately impacted either minorities or women, at least through the interview stage of the evaluation process.

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[6] See Footnote 3, *supra*.

Hence, even reading the evidence in the light most favorable to the nonmoving party, and reading all her filings with the liberality due a _pro se_ litigant, the plaintiff failed to establish a prima facie case of discrimination under Title VII. The plaintiff has only offered conclusory denials and unsubstantiated allegations in response to the District's showing of non discriminatory reasons for its actions. The ultimate burden of persuasion is with the plaintiff and she failed to meet that burden. The employer's policy of leaving promotion decisions to the unchecked discretion of lower level supervisors does not, by itself, give rise to any inference of discriminatory conduct contrary to Title VII. Watson, supra at 2786. Accordingly, the Court finds that there is no evidence upon which a jury could reasonably find for the plaintiff, Anderson, supra, and hereby grants defendant's motion for summary judgment.

## SECTION 1983 CLAIM

Section 1983 provides that, "every person who, under color of any statute, ...custom, or usage,...subjects, or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party in an action at law..." 42

U.S.C. sec. 1983. Because section 1983 and 1981 do not contain a statute of limitations, federal courts apply the most analogous state statute of limitations. Wilson v. Garcia, 471, U.S. 261, 105 S.Ct. 1938 (1985); Goodman v. Lukens Steel Co., 482 U.S. 656, 107 S.Ct. 2617 (1987). In California the appropriate analogous statute of limitations is one year. Cal.C.Civ. P. sec. 340; Del Percio v. Thornsley, 877 F.2d 785 (9th Cir. 1989).

The District argues that the plaintiff is barred by the statute of limitations. The District's argument, however, lacks merit. The plaintiff applied for the position of in house dean June 14, 1989, within one year of filing the complaint. Consequently, the Court will consider the plaintiff's allegations of discrimination under section 1983.

To establish a prima facie case of a

violation of section 1983, the plaintiff must allege that she has been deprived of a constitutional right under color of state law. The plaintiff contends that the District deprived her of constitutional due process. To determine whether the plaintiff has a constitutionally protected property interest, the Court must look to state law. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487 (1985). California law clearly establishes that there in no property interest in a school administrative position. Education Code sections 44893, 44894, and 44897 provide that the only permanent statutory position the plaintiff might have within the District is that of a classroom teacher. Tucker v. Roach, 163 Cal.App.3d 1051, 210 Cal. Rptr. 295 (1985), Grant v. Adams, 69 Cal.App.3d 127, 132, 137 Cal. Rptr. 834, (1977), Barthuli v. Board of Trustees, 19 Cal.3d 717, 722, 139 Cal. Rptr. 627 (1977). Since there is not a property interest attached to administrative positions there cannot be a property interest attached to preadministrative positions. Nor has the District violated any liberty interest of the plaintiff by its alleged actions. A liberty interest arises when the government dismisses an individual for reasons that seriously damage one's standing in the community. "To implicate constitutional liberty interests, however, the reasons for dismissal must be sufficiently serious to 'stigmatize' or otherwise burden the individual so that he is not able to take advantage of other employment opportunities." Loehr v. Ventura County Community College District, 743 F.2d 1310, 1317 (9th Cir. 1984).

The Supreme Court held in Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct.

2701 (1972), that a teacher subject to dismissal at the will of his employer did not have a liberty interest in his position, noting that a dismissal without associated charges, such as dishonesty or immorality, did not so stigmatize an individual that a liberty interest was implicated. In this case, the plaintiff retains her position as classroom teacher, Denying her the position of in house dean was not stigmatizing, nor publicized in a way that would affect her ability to retain other appointments.

Absent the deprivation of a constitutional right, the plaintiff cannot make a prima facie case of discrimination under section 1983. Accordingly, the Court grants the District summary judgment as to the section 1983 claim.

## SECTION 1981 CLAIM

The governing statute of limitations for a section 1981 claim is one year. Wilson v. Garcia, supra; Cal.C.Civ.P sec. 340. The plaintiff claims that she applied for the positions of in house dean and assistant principal within one year of filing the complaint. Since the plaintiff later admitted that she had not, in fact, applied for the position of assistant principal, the Court will only consider the contentions pertaining to the position of in house dean. (Deposition of Plaintiff, Vol. II, at 203).

Section 1981 applies to the making and enforcing of contracts. To state a claim of discrimination under section 1981, the plaintiff must show that the promotion she was denied rises to the level of an opportunity for a new and distinct relationship between the District and herself. The failure to promote is only actionable under section 1981 if the nature of the change in position was such that it involved the opportunity to enter into a new contract with the employer. Patterson v. McLean Credit Union, __U.S.__, 109 S.Ct. 2363, 2376-77 (1990).

In the present case, the position of in house dean does not provide an opportunity for a new and distinct relation between the plaintiff and the District. The pre-administrative position, by its very nature, does not afford the opportunity to enter into a new contract with the District, and, therefore, does not give rise to a claim under section 1981. Hence, the Court grants summary judgment to the District on the plaintiff's section 1981 claim.

According to the foregoing analysis, the Court finds that no evidence exists upon which a jury could reasonably find for the plaintiff. Consequently, the Court GRANTS the District's motion for summary judgment as to all counts.

IT IS SO ORDERED.

Dated: Feb 4 1991

JOHN G. DAVIES

JOHN G. DAVIES
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 89-1522-JGD

ELLEN BRASWELL,

Plaintiff,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Defendant.

Filed September 12, 1989

## ORDER DISMISSING PLAINTIFF'S FIRST AMENDED COMPLAINT

On May 30, 1989, plaintiff Braswell filed a first amended complaint for damages and an injunction based on alleged employment discrimination in violation of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 1981 and 42 U.S.C. Sec. 1983. Plaintiff also stated pendent claims for defamation and intentional infliction of emotional distress.

On July 19, 1989, defendant Los Angeles Unified School District, pursuant to F.R.Civ.P. 12(b)(6), moved to dismiss plaintiff's first amended complaint on the grounds that the complaint failed to state a cause of action upon which relief could be granted. Plaintiff's opposition to the defendant's motion concedes that the first amended complaint contains some of the defects raised by the motion. Plaintiff's opposition includes a proposed second amended complaint; plaintiff requests leave to file the second amended complaint pursuant to F.R.Civ.P. 15(a).

The Court hereby GRANTS without prejudice defendant's motion to dismiss plaintiff's first amended complaint. Plaintiff is hereby granted leave to file a second amended complaint within twenty days. Therefore, plaintiff's motion for leave to file a second amended complaint, set for hearing on October 2, is vacated.

As a result of this Order, defendant's motion to dismiss, set for hearing on September 11, 1989, is taken off calendar and the parties need not appear.

IT IS SO ORDERED.

Dated: September 12, 1989

JOHN G. DAVIES

JOHN G. DAVIES
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 89-1522-JGD

ELLEN BRASWELL,
Plaintiff,
v.
LOS ANGELES UNIFIED SCHOOL DISTRICT,
Defendant.

Filed November 6, 1990

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## ORDER

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On November 5, 1990, the Court was prepared to hear three motions in this case: Plaintiff's motion to continue summary judgment, Defendant's summary judgment motion, and Plaintiff's motion to serve additional interrogatories. Given that the Plaintiff continues to appear pro se in this matter, the Court believes that a continuance of the summary judgment motion is appropriate.

Defendant's summary judgment motion was originally filed on July 23, 1990 and set for hearing on October 1, 1990. Since that time, the Court has granted numerous continuances to the Plaintiff within which to file opposition papers. In large part, the continuances were allowed due to Plaintiff's inability to retain new counsel following the withdrawal of her prior attorney in August, 1990.

Finally, on October 31, 1990, Plaintiff filed a belated opposition to the motion, but filed to attach the relevant exhibits. Accordingly, the Court HEREBY GRANTS a three-week continuance to the plaintiff. The hearing on Defendant's summary judgment motion is thus continued until Monday, November 26, 1990 at 2:30 p.m. In addition, Plaintiff has the opportunity to file further opposition papers to the summary judgment motion until Friday, November 23, 1990 at noon.

Lastly, the Court HEREBY DENIES Plaintiff's motion to serve additional interrogatories.

IT IS SO ORDERED.

Dated: November 6, 1990

JOHN G. DAVIES

JOHN G. DAVIES
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 89-1522-JGD

ELLEN BRASWELL,

Plaintiff,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Defendant.

Filed February 28, 1991

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## ORDER

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On February 19, 1991, plaintiff lodged a request for a court appointed attorney, for clarification of the Court's order granting the defendant's motion for summary judgment, and for information regarding procedure for instituting an appeal. As plaintiff is pro se, the Court will respond to her inquiries.

The Court granted the defendant's motion for summary judgment as to all counts February 7, 1991. The result of which was a judgment in favor of the defendant Los Angeles Unified School District and against the plaintiff, Ellen Braswell. Granting of that motion ends the plaintiff's case in this Court. The plaintiff may appeal that ruling to the United States Circuit Court of Appeals, Ninth Circuit.

In a civil case the notice of appeal must be filed with the clerk of the district court within thirty (30) days after the entry of the judgment or order appealed from. The order granting defendant's motion for summary judgment was entered February 7, 1991. Thus, the plaintiff has thirty days from that date in which to file a notice of appeal. See, Federal Rules of Appellate Procedure, Rule

4(a) and Rule 3(c) for the content of the notice of appeal.

Again, the Court DENIES the plaintiff's request for court appointed counsel. The plaintiff has failed to meet the factors set out by the Ninth Circuit in Bradshaw v. Zoological Soc. of San Diego, 662 F.2d 1301, 1318 (9th Cir. 1981).

IT IS SO ORDERED.

Dated: February 22, 1991

JOHN G. DAVIES

JOHN G. DAVIES
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 89-1522-JGD

ELLEN BRASWELL,
Plaintiff,
v.
LOS ANGELES UNIFIED SCHOOL DISTRICT,
Defendant.

Filed November 26, 1990

## ORDER DENYING PLAINTIFF'S EX PARTE APPLICATION

On November 13, 1990, Plaintiff Ellen Braswell filed an Ex parte Application making the three following requests of the Court: 1) to continue the hearing on defendant's motion for summary judgment, 2) to allow plaintiff to propound additional interrogatories to the defendant, and 3) to appoint an attorney to represent plaintiff. Having considered the arguments presented, the Court HEREBY DENIES plaintiff's application in its entirety.

Plaintiff originally filed her complaint on March 14, 1990. At a March 26, 1990 status conference, the Court set the following schedule:

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|---|---|
| Discovery Cut-Off | August 20, 1990 |
| Pre-Trial Conference | August 27, 1990 |
| Trial | September 4, 1990 |

Defendant's summary judgment motion was filed on July 23, 1990 and after granting plaintiff' request for a continuance, the Court set the hearing for October 1, 1990. On October 1, 1990, the Court vacated the trial date and set the hearing on the defendant's motion for summary judgment for November 5, 1990. Most recently, on November 5, 1990, the Court granted a further and final three-week continuance to allow plaintiff to file supplemental opposition papers.

This chronology illustrates the Court's patience with the plaintiff. The Court has granted numerous requests by the plaintiff for continuances of the defendant's motion for summary judgment because the Court is mindful that plaintiff appears in this matter _pro se_. Plaintiff has been extended latitude in this matter that would not have been accorded a lawyer.

Nonetheless, to reiterate, the hearing on defendant's summary judgment motion is now scheduled for Monday, November 26, 1990 at 2:30 p.m. The Court has allowed plaintiff to file opposition papers by or before noon, Friday, November 23, 1990.

Accordingly, plaintiff's requests to continue the summary judgment hearing an to serve additional interrogatories are denied.

Further, the Court again DENIES plaintiff's application for court-appointed counsel. 42 U.S.C. Sec. 2000e-5(f) states:

> upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and amy authorize the commencement of the action without the payment of fees, costs, or security.

The Ninth Circuit has articulated three factors a district court should consider in exercising its discretion in ruling on requests for counsel under Title VII. They are, (1) the plaintiff's financial resources, (2) the efforts made by the plaintiff to secure counsel, and (3) whether the plaintiff's claim has merit.

Bradshaw v. Zoological Soc. of San Diego, 662 F.2d 1301, 1318 (9th Cir. 1981).

The plaintiff has alleged in her request that she cannot afford counsel and that she has made a diligent effort to secure new counsel after her attorney withdrew from representation on or about August 6, 1990. However, in reviewing the pleadings and the evidence presented by the defendant in support of its motion for summary judgment, and the evidence presented thus far by the plaintiff in opposition to the motion for summary judgment, the Court determines that plaintiff's claim lacks significant merit. Thus, the motion to appoint counsel is DENIED.

IT IS SO ORDERED.

Dated: November 26, 1990

JOHN G. DAVIES

JOHN G. DAVIES
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 89-1522-JGD

ELLEN BRASWELL,

Plaintiff,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Defendant.

[Filed October 1, 1990]

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## CIVIL MINUTES--GENERAL

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PRESENT: Hon. John G. Davies (Judge), Jim Holmes (Deputy Clerk), Beverly Casares (Court Reporter)

PROCEEDINGS: Plaintiff's Request for Appointment of Counsel.

Ruling: Motion denied.

Discussion: The Court has doubts about the legal merits of plaintiff's claims.

This is sufficient to deny motion. See Court's order re summary judgment.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 89-1522-JGD

ELLEN BRASWELL,

Plaintiff,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Defendant.

Filed October 1, 1990

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**CIVIL MINUTES--GENERAL**

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PRESENT: Hon. John G. Davies (Judge), Jim Holmes (Deputy Clerk), Beverly Casares (Court Reporter)

PROCEEDINGS: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

**Ruling:** **The motion is continued to Monday, November 5, 1990, at 2:30 p.m. The trial date is vacated.**

Discussion: The plaintiff now appears pro se. She has been represented by counsel. Counsel withdrew in early August, leaving plaintiff without assistance to oppose this motion. The Court has reviewed the motion and considers it to have substantial merit. So much so that the Court will not appoint counsel for plaintiff. The motion is continued five weeks to allow plaintiff to retain counsel.

~~Plaintiff may file further opposition~~ to the motion on or before October 31, 1990.

In the event plaintiff continues pro se, she is advised to file further opposition papers. In those papers she should produce evidence by way of a declaration by herself, and/or by others, in which the factual basis for each of her claims is set forth. The Court notes that her opposition filed on September 24, 1990, sets forth no facts that relate to her claims. To successfully oppose this motion, the plaintiff must offer facts which support her contentions.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-55365
D.C. No. CV 89-1522-JGD

ELLEN BRASWELL,
Plaintiff-Appellant,
v.
LOS ANGELES UNIFIED SCHOOL DISTRICT,
Defendant-Appellee.

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## ORDER

[Regarding Petition for Rehearing
With Suggestion for Rehearing En Banc]
(Order of the Court of Appeals
Denying Petition for Rehearing)

[Filed May 4, 1993]

Before: PREGERSON, LEAVY, and TROTT,
Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Stamped by: CATHY A. CATTERSON

Cathy A. Catterson
Clerk, U.S. Court of Appeals

# APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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No. 91-55365

D.C. No. CV 89-1522-JGD

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ELLEN BRASWELL,

Plaintiff-Appellant,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Defendant-Appellee.

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Appeal from the United States

District Court for the

Central District of California

John G. Davies, District Judge, Presiding

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Submitted February 4, 1993[*]

Pasadena, California

Filed February 11, 1993

## MEMORANDUM[**]

Before: PREGERSON, LEAVY, and TROTT,
Circuit Judges.

On January 8, 1990, the appellant, a black school teacher, filed a third amended complaint against the Los Angeles Unified School District ("school district"), alleging claims of race and sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Secs.

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[*] The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

[**] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3

2000e et seq., and 42 U.S.C. Secs. 1981 and 1983. The school district moved for summary judgment. The appellant's counsel withdrew shortly before the hearing on the motion, filing a declaration with the district court as to why she withdrew. The appellant proceeded pro se.

Because of the appellant's pro se status, the court granted numerous continuances and repeatedly informed the appellant in writing and orally prior to the hearing on the motion for summary judgment that the materials she had provided thus far were deficient to show that genuine issues of fact remained for trial.

The issues on appeal are: (1) whether the district court properly applied Federal Rule of Civil Procedure 56(e); (2) whether the court abused its discretion in denying the appellant a court-appointed attorney; (3) whether the district court's denial of appellant' request of additional discovery was an abuse of discretion; and (4) whether the district court's ruling that appellant could not amend her third amended complaint was an abuse of discretion.

1. Whether the District Court Erred in Its Application of Rule 56(e)

The appellant argues that the district court was obligated to examine the entire record to determine if there was a genuine issue of material fact.

We have held that a court's duty to sift through the record to determine if there are genuine issues of fact (especially where there is no reference to pertinent exhibits) is limited by the promulgation of a local rule. Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec, 854 F.2d 1538, 1545 (9th Cir. 1988) (per curiam) ("Hydrolec").

Hydrolec, like this case, was filed in the Central District of California, where Local Rules 7.14.2 and 7.14.3 govern the requirements for plaintiffs and defendants in summary judgment motions. Under these local rules, there is "an affirmative burden to list genuine issues with appropriate record citations in order to withstand the motion for summary judgment." Id. Consequently, we held that

> when a local rule such as United States District Court-Central District of California Rule 7.14.3 has been promulgated, it serves as adequate notice to nonmoving parties that if a genuine issue exists for trial, they must identify that issue and support it with evidentiary materials, without the assistance of the district court judge.

Id. (emphasis added). In other words, "the law of this circuit...recognizes that a district court is under no obligation to mine the full record for issues of triable fact." Schneider v. TRW, Inc., 938 F.2d 986, 990 n.2 (9th Cir. 1991) (citing Hydrolec, 854 F.2d at 1545).

Therefore, neither the district court nor this court need sift through the record, particularly where appellant was warned that her opposition was deficient for failure to contain facts. See Hydrolec, 854 F.2d at 1545 (trial court warns party that its opposition was insufficient). Despite every latitude the court provided, the appellant followed neither the local rules, of which she was aware (see ER 1 at 214), nor the court's specific instructions to produce facts.

Where the district court gave the appellant every benefit, the latitude to ignore formalities on the part of a pro se plaintiff does not extend to a complete failure to comply with the rules and the court's instructions. We affirm the district court on the sole ground that Local Rule 17.14.3 "serves as an adequate notice to nonmoving parties that if a genuine issue exists for trial, they must identify that issue and support it with evidentiary materials, without the assistance of the district court judge." Hydrolec, 854 F.2d at 1545.[1]

### 2. Whether the District Court Erred in Denying the Request for Additional Discovery

The appellant argues that she could not obtain important evidence for her case because the court denied her request for additional discovery. A district court's discovery rulings are reviewed for an abuse of discretion. United States v. Mandel, 914 F.2d 1215, 1219 (9th Cir. 1990).

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[1] Simply by reading the defendant's motion, which identifies precisely the material facts and gives record citation, this articulate, educated appellant should have been able to identify disputed facts and provide references to the record, if any.

The appellant filed a motion to served additional interrogatories on November 13, 1990, only two weeks before the rescheduled hearing on summary judgment on November 26, 1990. She did not file an affidavit to show that she could not present facts essential to justify her opposition as required by Rule 56(f). In view of the fact that there already had been a substantial passage of time and numerous continuances in deference to the appellant's status, we conclude that the district court did not abuse its discretion in denying additional interrogatories.

### 3. Whether the District Court's Denial of the Request for a Court-Appointed Attorney Was an Abuse of Discretion

The appellant argues that the district court should have appointed her counsel. A district court's decision on a motion for appointment of counsel is reviewed for an abuse of discretion. Bradshaw v. Zoological Soc. of San Diego, 662 F.2d 1301, 1318 (9th Cir. 1981).

There are three factors a district court must weigh in its decision whether to appoint counsel: (1) the plaintiff's ability to pay; (2) the efforts plaintiff makes to secure counsel; and (3) whether the claim has merit. Bradshaw, 662 F.2d at 1318. The district court recognized that plaintiff alleged she could not afford counsel and that she had made diligent efforts to find a substitute counsel. However, the court decided that, in the face of the defendant's motion for summary judgment and the evidence presented thus far in opposition to it, the appellant's claim lacked merit. We affirm the district court's ruling.[2]

### 4. Whether the District Court Erred in Denying Leave to Amend the Third Amended Complaint

The appellant argues that she wished to amend her third amended complaint to reinstate the claims of age discrimination, defamation, intentional infliction of emotional distress, and retaliation, which were first alleged in the first amended complaint. The claims were dropped from the second and third amended complaints by appellant's attorney after the court dismissed the first amended complaint for failure to state a claim under Rule 12(b)(6).

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[2] This court has held that an EEOC determination of "reasonable cause" is ordinarily sufficient to show a plaintiff's case has merit. Bradshaw, 662 F.2d at 1319-20. However, Bradshaw did not involve a summary judgment motion. Rather, it involved a reversal of a summary judgment motion on a Title VII and section 1983 action and a remand for further proceedings. Here, where appellant requested counsel when faced with a summary judgment motion, the question of merit is different from whether the pleadings are adequate to support a claim.

The denial of leave to amend after a responsive pleading has been filed is reviewed for an abuse of discretion. Texaco, Inc. v. Ponsoldt, 939 F.2d 794, 798 (9th Cir. 1991).

The Supreme Court allows dismissal of a pro se complaint for failure to state a claim only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Rizzo v. Dawson, 778 F.2d 527, 529-30 (9th Cir. 1985). The district court had ruled early in the case that the appellant could prove no set of facts in support of age discrimination, defamation, intentional infliction of emotional distress, and retaliation. It did not abuse its discretion, therefore, to dismiss a motion to reinstate the same claims.

AFFIRMED.

Stamped by: Cathy A. Catterson

Cathy A. Catterson
Clerk, U.S. Court of Appeals

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 89-1522-JGD

ELLEN BRASWELL,

Plaintiff,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Defendant.

Filed February 4, 1991

Entered February 7, 1991

## ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

On November 26, 1990, defendant's motion for summary judgment came on for hearing. Having reviewed and considered the papers and oral arguments presented by the parties, the Court hereby GRANTS defendant's motion. All other motions are hereby taken off calendar.

## FACTS

Plaintiff is black. She has been employed by the Los Angeles Unified School District as a teacher. She taught for 12 years at Polytechnic High School ("Polytechnic"), from 1974 to 1985. From 1983 to 1984, the plaintiff held the position of yearbook advisor but requested she be relieved of this position in 1984.[1] In 1985, the plaintiff unsuccessfully applied for the position of mentor teacher. In 1985, the plaintiff filed a complaint with the Equal Opportunities Employment Commission alleging discriminatory treatment on the basis of sex and race at Polytechnic.

In 1985, at her request, the plaintiff transferred to Granada Hills High School ("Granada") where she continues to teach. In 1986, the plaintiff applied for the positions of peer counselling director and teen line liaison director, but was rejected. The plaintiff held the position of school coordinator for the Teen Line Liaison program, which was the only school office in the program. In 1986, 1987, and 1988 the plaintiff applied for the office of in house dean at Granada. However, Jody Dunlap already held that position in 1985 and continued to do so through 1989. In 1988 Bob Weinberg and Loretta Duncan respectively were selected to serve as in house dean on a part time basis, and Jim Gwin was assigned to the position part time in the fall of 1989. In 1990, Gwin was selected to serve as in house dean on a full time basis. The plaintiff unsuccessfully ran for the office of English

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[1] In some instances, the parties have only provided the Court with approximate dates. The dates specified in this order reflect this deficiency.

Department Chairperson in 1986. She also ran for representative to the School Site Council but was not elected. She took illness leave in Spring 1987 and academic years 1988-89 and 1989-90. She is presently on illness leave.

On October 25, 1988, the plaintiff amended her EEOC complaint alleging that discrimination against her due to her race and sex continued at Granada.

On March 14, 1989 the plaintiff filed a complaint for monetary and injunctive relief based on age, sex, and race discrimination against the Los Angeles Unified School District ("District"). Without having served the original complaint on the District, the plaintiff filed the first amended complaint May 30, 1989. This complaint asserted claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. sec. 2000e et seq, 42 U.S.C. section 1981, and 42 U.S.C. section 1983, intentional infliction of emotional distress and defamation. On September 12, 1989 the Court dismissed the first amended complaint for failure to state a claim, pursuant to Fed.R.Civ.P. 12(b)(6).

On September 29, 1989, the plaintiff filed a second amended complaint. In this complaint the plaintiff dropped her age discrimination claim and her pendent state claims, but realleged causes of action under Title VII and sections 1981 and 1983. On December 18, 1989, the Court granted the District's 12(b)(6) motion to dismiss the section 1983 claim. On January 8, 1990, the plaintiff filed a third amended complaint, alleging claims under Title VII and sections 1981 and 1983. The plaintiff alleges that the district discriminated against her by denying her requests to serve in various pre-administrative positions, her requests to transfer and her requests to teach honors classes, on the basis of plaintiff's race and sex. The plaintiff claims that the District discriminated against her by denying her applications to preadministrative positions. Denial of these preadministrative positions prevented the plaintiff from getting the experience necessary to pass the qualifying test for principal, assistant principal and dean, secondary. The plaintiff contends that these arbitrary selections policies denied her constitutional due process, violating section 1983.

The plaintiff claims she wa denied the position of mentor teacher in favor of a white male in the 1985-86 school year. In 1986, plaintiff states she initiated a program on peer counselling, but the position of director went to a white male.

Plaintiff contends she was also denied the positions of teen line liaison director and test coordinator in 1986. Plaintiff also asserts that she was denied the assignment of honors classes, the ability to serve as the chairperson of the English Department and to serve as representative to the School Site Council due to her race. The latter two positions were filled by popular election pursuant to the collective bargaining agreement between the District and United Teachers of Los Angeles ("UTLA"). The plaintiff argues that denial of preadministrative positions was part of a District policy to prevent minorities and women from gaining the requisite administrative experience to be promoted to principal, assistant principal, or dean, secondary. The plaintiff makes further allegations under section 1981.

The defendant filed this motion for summary judgment on all claims, July 23, 1990. However, on or about August 6, 1990, the plaintiff's attorney withdrew. Since that time, the plaintiff has proceeded pro se. In order to allow plaintiff time to prepare an opposition to the pending motion the Court has granted numerous continuances. The plaintiff has now filed an opposition to the motion for summary judgment and exhibits in support of her opposition.

## DISCUSSION

### THE STANDARD FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56(e), "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings...[T]he adverse party's response must set forth specific facts showing that there is a genuine issue for trial." Where the nonmoving party bears the burden of proof at trial on a dispositive issue, Rule 56(e) requires the nonmoving party to go beyond the pleadings and by his or her own affidavits, or by depositions, answers to interrogatories and admissions, designate issues of fact in dispute. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2553 (1986). To defeat a summary judgment motion, evidence must exist upon which a jury could reasonably find for the opposing party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 2512 (1986) ("Anderson").

A court must consider evidence presented in a summary judgment motion in the light most favorable to the opposing party. Id. at 2513. However, just as evidentiary facts are required to support a summary judgment motion, conclusory denials are insufficient to defeat summary judgment. Falls Riverway Realty, Inc. v.

Niagara Falls, 754 F.2d 49 (2d Cir. 1985). The Ninth Circuit has held that a party opposing a summary judgment motion cannot rest on its pleadings to carry its burden; in the absence of specific facts, as opposed to allegations, showing the existence of genuine issues for trial, a properly supported summary judgment motion should be granted. Nilsson, Robbins et al. v. Louisiana Hydrolec, 854 F.2d 1538 (9th Cir. 1988). Moreover, the Ninth Circuit stated that the Central District's Local Rule requiring a Statement of Genuine Issues in Dispute puts parities on notice that a party opposing a summary judgment motion must identify any issue remaining for trial. Id. at 1545. Mere unsubstantiated and conclusory allegations are insufficient to defeat a defendant's evidentiary showing under Fed. R. Civ. P. 56(e). Mitchel v. General Electric Co., 689 F.2d 877, 879 (9th Cir. 1982).

When a rational trier of fact could not find for the nonmoving party based on the record as a whole, there are no triable issues. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 1356 (1986). Summary judgment will not be defeated simply because issues of motive or intent are involved, and is proper when the plaintiff fails to indicate any motive or intent to support plaintiff's position. Morgan v. Harris Trust and Sav. Bank of Chicago, 867 F.2d 1023 (7th Cir. 1989).

A court should take proper care, however, to read a plaintiff's pleadings and motions liberally when pro se complaints are involved. Haines v. Kerner, 404 U.S. 519, 520-21, 92 S.Ct. 594, 595-96 (1972); Bullock v. Sweeney, 644 F.Supp. 507, 508 (N.D. Cal. 1986), aff'd 823 F.2d

554.

In this case, while initially represented by counsel, the plaintiff is now pro se. The Court instructed the plaintiff as to what her opposition to the motion for summary judgment must encompass, and continued hearings on the motion for summary judgment for a total of fourteen weeks to allow her to prepare her opposition. The Court has afforded the plaintiff a latitude it would not have afforded an attorney. The plaintiff has now filed her opposition to the motion for summary judgment and exhibits in support thereof. Having considered these filings and attempted to liberally weigh the evidence in the plaintiff's favor, the Court GRANTS the motion for summary judgment. Therefore, the Court concludes the plaintiff has produced no convincing evidence to support her claims and thus has failed to carry the burden required to defeat the motion.

**TITLE VII CLAIM**

The plaintiff filed her complaint with the Equal Employment Opportunities Commission ("EEOC") on June 10, 1985, and amended that complaint October 25, 1988. Though some of the alleged discriminatory incidents fall outside the limitations period of Title VII[2], the Court may still consider those incidents due to the continuing nature of the alleged violations. The doctrine of continuing violation will apply when a plaintiff has attacked a discriminatory employment system or practice. Reed v. Lockheed Aircraft Corp.,

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[2] Title VII provides a statute of limitations. A charge of discrimination must be filed within 180 days of the alleged discrimination or within 300 days if there is a state compliance agency. 42 U.S.C. 2000e-5(e). California has such an agency.

613 F.2d 757 (9th Cir. 1980). In applying this doctrine, the critical inquiry is whether any present violation exists. United Air Lines, Inc. v. Evans, 431 U.S. 553, 97 S.Ct. (1977). A plaintiff must be able to show a present and ongoing violation of constitutional rights to prevent claims from being time barred. If defendant practiced a policy of discrimination over an extended period of time, a court need only determine whether the plaintiff was exposed to discrimination during the limitations period. Williams v. Owens-Illinois, Inc., 665 F.2d 918 (9th Cir. 1982). In the instant case, the plaintiff has met this burden. The plaintiff alleges both in her EEOC complaint and in her pleadings that the District engaged in a systematic pattern of discrimination toward the plaintiff due to her race and sex. Though on sick leave, the plaintiff

is still an employee of the District. Thus any discriminatory system employed by the District continues to impact the plaintiff. Furthermore, the plaintiff produced evidence of the continuing nature of the alleged discrimination. On June 14, 1988, the plaintiff again unsuccessfully applied for the position of in house dean. Hence, the plaintiff has been adversely affected by the District's alleged policy within the limitations period.

Finding that the plaintiff's claims are not time barred, the Court must next address the merits of the plaintiff's allegations under 42 U.S.C. sec. 2000e et seq.

Title VII protects employees against employment practices which adversely affect an individual's status as an employee, because of the individual's race, color, religion, sex, or national origin.

42 U.S.C. sec. 2000e-2(a). Title VII in the relevant part provides: (a) It shall be unlawful employment practice for an employer

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin.
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way that would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Title VII precludes two kinds of discrimination. When an employer treats some employees less favorably than others, the discrimination is labeled "disparate treatment". Proof of discriminatory motive is critical, although in some situations it may be inferred from the mere fact of difference of treatment. The Supreme Court has found that disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 97 S.Ct. 1843 1977). The second type of discrimination concerns claims of disparate impact. This theory of discrimination involves employment practices which are facially neutral in their treatment of different groups but which in fact fall more harshly on one group and cannot be justified by business necessity or some other legitimate business justification. Proof of discriminatory motive is not required under a disparate impact analysis. Id.

In McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 1973) ("McDonnell-Douglas"), the Supreme Court established the basic allocation of burdens and order of proof in a Title VII case. First, the plaintiff must demonstrate a prima facie case of intentional discrimination by a preponderance of the evidence. Second, if the plaintiff succeeds, the burden of production shifts to the defendant to articulate legitimate, non-discriminatory reasons for its decisions. Third, if the defendant carries this burden, the plaintiff must then establish hat the reasons offered by the defendant were simply a pretext for discrimination. Id., 93 S.Ct. at 1825. While the burden of proving a prima facie case of disparate treatment is not onerous, the ultimate burden of persuading the trier of fact that a defendant intentionally discriminated against the plaintiff is at all times with the plaintiff. Texas Dept. of

Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093 (1981) ("Burdine").

In order to establish a prima facie case of discriminatory treatment, the plaintiff must show that she was treated less favorably than similarly situated employees. The plaintiff must also show that the defendant intended to discriminate. In the context of promotions the plaintiff must show that after having rejected the plaintiff's application for a promotion, the District continued to seek applicants with qualifications similar to the plaintiffs. Watson v. Fort Worth Bank and Trust, 108 S.Ct. 2777 (1988) ("Watson"). The plaintiff has in all respects failed. The District has articulated legitimate, nondiscriminatory reasons for its actions, and has produced convincing evidence of these nondiscriminatory reasons. Three of the positions to which the plaintiff aspired were either not vacant or the plaintiff lacked the requisite qualifications. As to other positions or offices the plaintiff has not carried her burden of showing that the reasons offered by the District are merely pretexts for discriminatory decision making. Further, the plaintiff offers no evidence beyond conclusory allegations that the facially neutral selection criteria employed by the District pursuant to the collective bargaining agreement, has a discriminatory impact on minorities or women.

The plaintiff contends that the district arbitrarily and intentionally denied her appointments to pre-administrative positions because of her race. However, three of the positions to which the plaintiff lays claim were either not vacant during plaintiff's tenure of employment, or she did not actually apply to those positions. Furthermore, of the positions to which the plaintiff lays claim, the plaintiff held one, and did not apply for another position. The Court addresses these contentions below.

1. Youth Services Coordinator

The plaintiff claims that the District denied her application for the post of youth services coordinator while at Granada. However, while she may well have been qualified, the post of Youth Service Coordinator was not vacant during plaintiff's employment at Granada. Joe White is presently the youth services coordinator at Granada and was prior to the plaintiff's transfer to Granada. The District stated that since White continued to perform satisfactorily it had no reason to remove him from the position. (Declaration of Anne Falotico, principal of Granada, at 7). Since the position was not vacant, the plaintiff cannot make a prima facie case of discrimination.

### 2. Test Coordinator

The test coordinator provides planning and coordination for the subject content of various exams. Plaintiff asserts that she sought the position in 1986, but the District intentionally kept her uninformed as to when the meeting to elect the test coordinator would be held. A member of the committee finally told her late in the day that the meeting would be that day, after class periods ended, since it was the only time the committee could all meet. Plaintiff did not attend the meeting, claiming a previous engagement. The plaintiff did not remove her name from the eligibility list, but the committee appointed John Holodnik, a white male. The plaintiff has no knowledge of how or when the other candidates were notified of the time of the committee meeting. The plaintiff has no opinion as to whether Holodnik was better qualified than the plaintiff to hold the position of test coordinator. In fact, the plaintiff states that Holodnik may have more experience than the plaintiff because he assisted the previous test coordinator, Tom Griffin. (Deposition of the Plaintiff, vol. II, at 65-70).

### 3. Teen Line Liaison Director

The plaintiff contends she established the teen line liaison program in 1986. After she established the program the directorship was given to a white male. The teen line program is coordinated by Cedar Sinai Hospital and arranges presentations to students at different schools on a rotating basis. The only school position in the program was that of a contact person for Cedar Sinai Hospital at Granada. The principal of Granada appointed the plaintiff to that office in 1986. When the plaintiff went on leave in 1987, the principal appointed someone else to fill the position. Thus the plaintiff held the only available position while at Granada and present on the job. (Declaration of Falotico, at 11).

4. UTLA Council

Plaintiff contends that the District refused her appointment to the UTLA Council. However, no position by this name exists or could be identified by the plaintiff. (Deposition of Plaintiff, Vol II, at 7. See also, Declaration of Falotico, at 6).

### 5. English Department Chairperson and School Site Council

The plaintiff asserts that the District denied her appointments to be Chairperson of the English Department and representative to School Site Council. Both these offices were filled by popular election. The plaintiff contends that the voting method employed by the District discriminated against non whites.

The School Site Council is a decision making body made up by parents, teachers, the principal, and other school site personnel for the purpose of school improvement. Participants volunteer their time. School Site Councils adopt their own bylaws, including size and membership of the Council. Councils are established at schools that opted to participate in the

School Improvement Program. A School Site Council did not exist at Polytechnic. (Declaration of Lupe Sonnie, principal of Polytechnic from 1981 to 1983, at 4). A School Site Council did exist at Granada and the positions were filled by popular election. At Granada, the faculty elects five teachers to the School Site Council every year. The plaintiff does not state in any of her filings what years she ran for a position on the School Site Council. Furthermore, she makes no showing that she was personally discriminated against in running for the position. Finally the plaintiff makes no showing that minorities or women as a class were not elected to the School Site Council, or that the election process was tainted in any way.

English Department Chairperson is also a popularly elected office. This method of selection was determined by the collective bargaining agreement between UTLA and the District. Plaintiff has contends that due to the racial makeup of the individual schools, there were only two black English teachers among a faculty of fifteen at Granada, black teachers would have no chance to be elected.

To make a prima facie case under Title VII that a racially neutral policy or practice such as this has an impermissible discriminatory effect, the plaintiff must establish that the practice results in a disproportionate under representation of protected minorities. To establish disparate impact the plaintiff must show that there are more than statistical disparities in the employer's work force. The plaintiff must identify specific employment practices responsible for the disparities, and prove causation. Watson v. Fort Worth Bank and Trust, supra at

2786. The plaintiff fails in both respects.

The plaintiff presented no evidence indicating that only whites or men were popularly elected or that non whites or women were systematically not elected to, or even discouraged from applying for, these positions. The plaintiff merely identified a specific facially neutral practice and argued that it had a disparate impact on non whites. She offered no evidence of illegal disparities between the number of minorities and non minorities in the District's work force as a whole, nor in the elected positions. Thus, the plaintiff failed to make her prima facie case as to disparate impact under Title VII.

### 6. Honors Classes

The plaintiff also claims that the District did not assign her any honors classes to teach because of her race. The plaintiff was assigned and taught advanced courses at Polytechnic during the 1984-85 school year. The principal of Granada states that the plaintiff also had the opportunity to teach honors courses while at Granada, as did all teachers. (Declaration of Philip Nassief, at 4; Declaration of Sonnie, at 4; and Declaration of Falotico, at 11). The plaintiff was never actually assigned any honors classes at Granada, though she indicated her desire to teach them. She contends that white teachers with less experience were assigned honors classes. The plaintiff named five teachers in her deposition, but her opinion that those teachers were less experienced than she is based only on casual conversations. Since the plaintiff provides no evidence that less qualified whites were appointed to honors classes in preference to the plaintiff, she fails to establish a prima facie case of disparate treatment under Title VII.

7. Mentor Teacher

The plaintiff further contends that she was denied the position of mentor teacher during the period 1985-86 in favor of a white male rehired after retirement. No such position exists, however. The plaintiff appears to be confusing two positions. The retired mentor position is a separate program from the mentor teacher program. The retired mentor program is staffed by retired teachers to help new teachers for a maximum of 100 hours per semester. The position was created by specially designated funds from the District's Priority Staffing program specifically to hire retired teachers. The plaintiff was not retired teacher. She was not eligible for the position, even if she did in fact apply. The principal of Granada hired Don Schulz for the years 1985-86 and Mrs. Fishchli[3] for the years 1986-90, both retired, to fill the position. (Declaration of Falotico, at 8-9). Mentor teachers, on the other hand, are selected on a District wide basis by a Committee under Article XXVI of the collective bargaining agreement between the District and UTLA. Plaintiff states she applied to the principal for the position, but never applied at the District level, where the appointment would occur. Without having actually applied to the correct authority for the position, the plaintiff fails to make a prima facie case under Title VII.

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[3] Neither party provided the Court with Mrs. Fischili's first name.

### 8. Peer Counselling Director

Plaintiff claims that she was denied the position of peer counselling director. She claims she applied for the office of director in 1986. The peer counselling program is a group of student counsellors who seek to aid fellow students. A staff trainer must possess a pupil personnel credential. The principal appointed Dale Alpert who possessed such credential. The plaintiff did not posses a credential. The other position associated with the peer counselling program is the position of teacher of the guidance class. The principal assigned Allan Kakassy to teach the guidance class because he showed intense interest and desire to be involved in the program. The principal informed the plaintiff that if she wanted to be involved she could volunteer to assist Kakassy. (Declaration of Falotico, at 8). The plaintiff did not volunteer.

In making a claim under Title VII, the burden of proof is always on the plaintiff. Burdine, supra. After the plaintiff has alleged intentional discrimination, the defendant may rebut such evidence by articulating non discriminatory reasons for its decision. If the defendant carries this burden the plaintiff must establish that the reasons offered by the defendant are a pretext for discrimination. McDonnell-Douglas, supra. In the instant case, the District appointed Alpert because of his particular credential. The District appointed Kakassy because of his intense interest in the program. The plaintiff, on the other hand, provides the Court with no evidence rebutting the District's professed nondiscriminatory motives for assigning both Kakassy and Alpert to the available positions with the peer counselling program. Mere allegations or denials of the District's evidence do not create a prima facie case or genuine issues of fact. Mitchel v. General Electric Co., supra.

### 9. School Transfers

Teacher initiated transfers are governed by the collective bargaining agreement between the District and UTLA. The District offers at least six kinds of transfer: voluntary transfer, general transfer, continuous service transfer, transfer to a magnet school, transfer to a year round school, and transfer to a school participating in the urban classroom teacher program ("UCTP").[4]

The plaintiff claims that the District denied her applications to transfer schools due to her race and sex. She contends that the District denied her repeated requests for school transfers to "schools within minority areas wherein she could obtain the requisite administrative qualifications." Plaintiff states that she repeatedly applied for a voluntary transfer and was repeatedly refused due to her race.

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[4] Since 1976, the Los Angeles School District has implemented a Teacher Staffing Integration Plan ("Plan") by order of the Office of Civil Rights. This plan establishes a teacher staff ratio based on the percentage of combined teacher minorities District wide. District schools must be within 15% of this annual ratio figure or are determined to be out of compliance. The district utilizes this ratio as guideline for school staffing. Through voluntary transfers of teachers schools seek to address ethnic imbalances. (Declaration Roberta Morris, Specialist in Teacher Integration Unit). The Third Circuit upheld this type of Plan in Kromnick v. School District of Philadelphia, 739 F.2d 894 (3rd Cir. 1984). The Third Circuit reviewed a voluntary policy of staff integration and held that although an overtly race conscious classification system might ordinarily signify a violation per se, applying a per se analysis to voluntary policies of staff integration designed to further the education of students of de facto segregated public school systems would be inconsistent with the intent of Congress underlying Title VII. Since this District employs alternative methods of transfer which are not governed by race conscious criteria for which the plaintiff would have been eligible, the Court does not reach the question of whether the race conscious classification is permissible.

Plaintiff appears only to have requested voluntary and general transfers during the period of 1983-85. The evidence indicates that the plaintiff at no time requested authorization to transfer to any other particular school. The principal who supervised plaintiff from 1983 to 1985 authorized plaintiff's voluntary transfer to Granada after the plaintiff had made various requests. (Declaration of Sonnie, at 5, and Memo to Pete Martinez from Albert Irwin, June 3, 1985, Declaration of Roberta Morris, at 3, stating that the district records indicate that for the period 1984-85, plaintiff applied for a general transfer in December 1984, a voluntary teacher integration program transfer, April 1985, and a general transfer/general exchange program transfer in April 1985. Records of transfers prior to that year have been destroyed as part of a regularly scheduled destruction process.) The plaintiff testified in her deposition that she never applied for a school transfer after her July, 1985 transfer to Granada. (Deposition of Plaintiff, Vol. III, at 48; See also Declaration of Falotico, at 9).

The District provided evidence to rebut the plaintiff's evidence that it deployed its transfer policy in a discriminatory manner. In 1985 the District granted the plaintiff's general transfer request. Evaluation by a Specialist in the Teacher Integration Unit for the District indicates that the plaintiff would have been eligible for various transfers other than those actually requested by the plaintiff during the period 1980-1990, however, the plaintiff failed to apply for any of these transfers. (Declaration of Morris, at 4). The plaintiff provided no evidence to show that non minorities were able to transfer more readily than the plaintiff, or that other types of transfers were unavailable to the plaintiff. Accordingly, the plaintiff fails to make a prima facie showing that she was treated less favorably than others due to her race.

### 10. Summary

The evidence produced in this motion establishes that the plaintiff was given opportunities to transfer between schools and to teach honors classes. Plaintiff has not shown that she or people of her race or sex were treated less favorably than others or that denial of administrative positions to her was in any way based on race. With two exceptions, all the positions that plaintiff claims were denied to her because of a policy of systematic discrimination were either not available during the periods the plaintiff was available to fill them, or the plaintiff actually held the position. She claims that the District's policy of maintaining racial parity among the schools' staff resulted in a situation where minority candidates were not elected to popularly elected offices. However, the plaintiff offered no evidence that other minority candidates were not elected. The plaintiff fails to meet her burden under the standard for summary judgment, by rebutting the District's showing of legitimate, nondiscriminatory motives for its actions.

Finally, the plaintiff argues that the denial of these preadministrative positions prevented her from gaining the experience necessary to pass the administrative portion of the test for principal, assistant principal, or dean, secondary. The plaintiff claims that denial of preadministrative positions to minorities and women is part of a district-wide policy to prevent women and minorities from attaining the positions of principal assistant principal and dean, secondary (now called assistant principal, student services). A review of the evidence presented, however, indicates that the plaintiff's contentions lack merit.

At the time the plaintiff took the promotional examinations, in 1981 and

1985, the promotional examination was a four step process. Applications were identified by number, so that during the promotional selection process there is no indication of the applicants race, sex, or age. Applicants were initially screened for education, experience, and credential qualification requirements. Qualified applicants then proceeded to the Training and Experience evaluation portion, where a committee reviewed the applicants skills in organization and management, communication, professional skills, human relations, academic preparation and professional experience. Successful candidates were then interviewed by the promotion committee. Qualified candidates made up the eligibility list. Hirings were made from this list as the need arose.

The plaintiff took the promotional examination for dean, secondary in 1985.

in that year, 263 applicants were initially screened. Of the applicants proceeding to the Training and Experience evaluation 25.6% were black and 56.2% were female. Of the applicants proceeding to an interview, 20% were black and 49.2% were female. Of the applicants on the final list of individuals eligible for promotion, 42.9% were female.[5]

The plaintiff took the promotional examination for assistant principal in 1981. In that year, 653 applicants were initially screened. Of the applicants proceeding to the Training and Experience evaluation 35.1% were black and 54.6% were female. Of the applicants proceeding to the interview, 25.9% were black, and 49.6% were female. Of the applicants on the final list of individuals eligible for promotion, 41.4% were female.[6]

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[5] The final statistics were compiled pursuant to a consent decree entered into by the District in 1981. The consent decree requires the District to obtain on each administrative promotional exam a qualified applicant pool containing at least 40% female applicants. If the applicant pool does not contain 40%, the District reinitiates the promotional examination in an effort to reach that figure. Szewiola, et al. v. LAUSD, Case No. CV 80-3348 WMB (C.D. Ca. 1981).

The District did not provide the Court with statistics for the number of black applicants who reached the final list of individuals eligible for promotion. This omission is not fatal. The plaintiff contends that she was denied the requisite preadministrative experience to pass the promotional exam. This lack of experience would screen the plaintiff out between the first stage and the Training and Experience stage of the promotional examination. At this stage of the screening process, the District provided statistics which indicate that the District's facially neutral employment practices do not fall more harshly on black or female applicants. Thus, the District effectively rebutted the plaintiff's claims that its policy of promotion disparately impacted either minorities or women, at least through the interview stage of the evaluation process.

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[6] See Footnote 3, supra.

Hence, even reading the evidence in the light most favorable to the nonmoving party, and reading all her filings with the liberality due a pro se litigant, the plaintiff failed to establish a prima facie case of discrimination under Title VII. The plaintiff has only offered conclusory denials and unsubstantiated allegations in response to the District's showing of non discriminatory reasons for its actions. The ultimate burden of persuasion is with the plaintiff and she failed to meet that burden. The employer's policy of leaving promotion decisions to the unchecked discretion of lower level supervisors does not, by itself, give rise to any inference of discriminatory conduct contrary to Title VII. Watson, supra at 2786. Accordingly, the Court finds that there is no evidence upon which a jury could reasonably find for the plaintiff, Anderson, supra, and hereby grants defendant's motion for summary judgment.

## SECTION 1983 CLAIM

Section 1983 provides that, "every person who, under color of any statute, ...custom, or usage,...subjects, or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party in an action at law..." 42

U.S.C. sec. 1983. Because section 1983 and 1981 do not contain a statute of limitations, federal courts apply the most analogous state statute of limitations. *Wilson v. Garcia*, 471, U.S. 261, 105 S.Ct. 1938 (1985); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 107 S.Ct. 2617 (1987). In California the appropriate analogous statute of limitations is one year. Cal.C.Civ. P. sec. 340; *Del Percio v. Thornsley*, 877 F.2d 785 (9th Cir. 1989).

The District argues that the plaintiff is barred by the statute of limitations. The District's argument, however, lacks merit. The plaintiff applied for the position of in house dean June 14, 1989, within one year of filing the complaint. Consequently, the Court will consider the plaintiff's allegations of discrimination under section 1983.

To establish a prima facie case of a

violation of section 1983, the plaintiff must allege that she has been deprived of a constitutional right under color of state law. The plaintiff contends that the District deprived her of constitutional due process. To determine whether the plaintiff has a constitutionally protected property interest, the Court must look to state law. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487 (1985). California law clearly establishes that there in no property interest in a school administrative position. Education Code sections 44893, 44894, and 44897 provide that the only permanent statutory position the plaintiff might have within the District is that of a classroom teacher. Tucker v. Roach, 163 Cal.App.3d 1051, 210 Cal. Rptr. 295 (1985), Grant v. Adams, 69 Cal.App.3d 127, 132, 137 Cal. Rptr. 834, (1977), Barthuli v. Board of Trustees, 19 Cal.3d 717, 722, 139 Cal. Rptr. 627 (1977). Since there is not a property interest attached to administrative positions there cannot be a property interest attached to preadministrative positions. Nor has the District violated any liberty interest of the plaintiff by its alleged actions. A liberty interest arises when the government dismisses an individual for reasons that seriously damage one's standing in the community. "To implicate constitutional liberty interests, however, the reasons for dismissal must be sufficiently serious to 'stigmatize' or otherwise burden the individual so that he is not able to take advantage of other employment opportunities." Loehr v. Ventura County Community College District, 743 F.2d 1310, 1317 (9th Cir. 1984).

The Supreme Court held in Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct.

2701 (1972), that a teacher subject to dismissal at the will of his employer did not have a liberty interest in his position, noting that a dismissal without associated charges, such as dishonesty or immorality, did not so stigmatize an individual that a liberty interest was implicated. In this case, the plaintiff retains her position as classroom teacher, Denying her the position of in house dean was not stigmatizing, nor publicized in a way that would affect her ability to retain other appointments.

Absent the deprivation of a constitutional right, the plaintiff cannot make a prima facie case of discrimination under section 1983. Accordingly, the Court grants the District summary judgment as to the section 1983 claim.

## SECTION 1981 CLAIM

The governing statute of limitations for a section 1981 claim is one year. Wilson v. Garcia, supra; Cal.C.Civ.P sec. 340. The plaintiff claims that she applied for the positions of in house dean and assistant principal within one year of filing the complaint. Since the plaintiff later admitted that she had not, in fact, applied for the position of assistant principal, the Court will only consider the contentions pertaining to the position of in house dean. (Deposition of Plaintiff, Vol. II, at 203).

Section 1981 applies to the making and enforcing of contracts. To state a claim of discrimination under section 1981, the plaintiff must show that the promotion she was denied rises to the level of an opportunity for a new and distinct relationship between the District and herself. The failure to promote is only actionable under section 1981 if the nature of the change in position was such that it involved the opportunity to enter into a new contract with the employer. Patterson v. McLean Credit Union, __U.S.__, 109 S.Ct. 2363, 2376-77 (1990).

In the present case, the position of in house dean does not provide an opportunity for a new and distinct relation between the plaintiff and the District. The pre-administrative position, by its very nature, does not afford the opportunity to enter into a new contract with the District, and, therefore, does not give rise to a claim under section 1981. Hence, the Court grants summary judgment to the District on the plaintiff's section 1981 claim.

According to the foregoing analysis, the Court finds that no evidence exists upon which a jury could reasonably find for the plaintiff. Consequently, the Court GRANTS the District's motion for summary judgment as to all counts.

IT IS SO ORDERED.

Dated: Feb 4 1991

JOHN G. DAVIES

JOHN G. DAVIES
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 89-1522-JGD

ELLEN BRASWELL,

Plaintiff,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Defendant.

October 1, 1990

## ORAL PROCEEDINGS

(In pertinent part as follows)

(...)

THE CLERK: Please come forward, and state your appearance on the record.

THE COURT: Are you Miss Braswell?

MS. BRASWELL: Yes, sir.

(...)

THE COURT: Now, Miss Braswell, have

you read the tentative ruling? It was on the counsel table or perhaps I -- if you would serve Miss Braswell with a copy of the tentative ruling, which will become the minute order in today's proceeding.

(...)

THE COURT: Then I will explain what I've done.

There are two minute orders. I would ask you to look at the minute order that pertains to the motion for summary judgment, and you will see by that minute order, I have continued this motion five weeks. To the first Tuesday in November. November 5th. The first Monday, excuse me, November 5th 1990.

Now, the reason I have done that is id give you more time. This is a serious motion, as far as your case is concerned. It may be dispositive of your case. From what I read, it could very well be.

You've presented me with no facts id rebut the motion for summary judgment, but because you are pro se, and without an attorney, I will give you, essentially, one more month. Either to find an attorney or, at least in your statement of opposition, state the facts that form the basis for the various claims that you make. You failed id do that.

You're opposition is a litany of reasons why you could not state the facts. I don't want that. I'm not interested in the reasons why you can't do things. I would appreciate it, if you would, if you cannot find counsel, simply do the best you can to state the facts that form the basis for the various claims that you make against the school district.

I will give you, still another opportunity, because you are representing yourself.

Therefore, the motion for summary judgment is continued to Monday November 5th, 1990 at the hour of 2:30 p.m.

The plaintiff may file further opposition to the motion on or before October 31st, 1990. That's the week, immediately before the Monday.

Have you papers in before that date or on or before October 31, 1990.

And I would direct your attention to the last paragraph of the minute order. I have attempted to give you guidance. That in a very general way tells you what you should do.

The motion to appoint counsel is denied. The reasons are set forth briefly in the minute order that pertains to that motion.

So, if you wish, you may return on the 5th of November 1990 to argue the motion, based upon, whatever you filed before October 31, 1990.

All right. Do you have any questions?

MS. BRASWELL: I guess I don't.

THE COURT: Do you have my questions about the procedures?

Do you have any questions about the nature of the papers that you should file?

MS. BRASWELL: Well, first of all, like I said, I'm a lay person. I'm not familiar with legal matters, et cetera.

THE COURT: You seem to be. Your papers, although they lack facts, they're certainly written in the legal style.

MS. BRASWELL: Not only that, I've been off on illness leave for two years.

THE COURT: Uh-huh.

MS. BRASWELL: And I have not been able--

THE COURT: You've explained that. I'm giving you another month.

MS. BRASWELL: It's kind of hard to get someone -- an attorney who wants to get in the midst of this muddle. So they claim.

THE COURT: It isn't such a muddle.

MS. BRASWELL: It was too short of a time for them, and then I don't have the money to pay an attorney for his services.

THE COURT: Well, this is a Title 7 case. If you win -- well, let me put it this way -- an award of attorneys' fees after a favorable result would be appropriate. I think most lawyers know that, when they go in this type of case.

MS. BRASWELL: Well, those so far, that I've asked, they said would not take it, unless I was able to pay them on an hourly basis.

THE COURT: I can understand that, now, that I've read the moving papers.

MS. BRASWELL: So, that's it.

THE COURT: Yes. If what is stated in the moving papers is true and cannot be rebutted, your case may not survive this motion.

MS. BRASWELL: What I was really trying to say is that it's kind of hard for a lay person to be able to competently handle the case without an attorney on such a short notice of time, particularly. One month is really not that much time either.

THE COURT: I'm not looking for competence. I'm looking for facts, and you've produced none. This is your opportunity to produce some facts.

MS. BRASWELL: Okay.

THE COURT: All right.

MS. BRASWELL: Thank you.

(Proceedings concluded.)

(...)

DATED: 6-2-91

BEVERLY A. CASARES

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BEVERLY A. CASARES CSR# 8630
Official Court Reporter

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 89-1522-JGD

ELLEN BRASWELL,

Plaintiff,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Defendant.

November 5, 1990

## ORAL PROCEEDINGS

(In pertinent part as follows)

APPEARANCES:

| | |
|---|---|
| FOR PLAINTIFF(S) | ELLEN BRASWELL<br>(...) |
| FOR DEFENDANT(S) | KERRY CUNNINGHAM<br>LAUSD<br>(...) |

(...)

THE COURT: Miss Braswell, you seek

to continue this once more. What is the reason?

MS. BRASWELL: Because I haven't had enough time to do the research that I need to do to get any data, statistical data, that I would like to have to settle this case. There are just a number of things that I need to do. In this kind of case, I think that statistical evidence is very important.

THE COURT: Well, you have filed nothing in opposition of the motion for summary judgment, and as I recall, the last time you were here, you stated that the issue was, that your opposition contained no exhibits of any kind, but, nevertheless, you stated that you had the material. You had certain exhibits.

MS. BRASWELL: I do have some.

THE COURT: Now, I continued it one month, so, to give you an opportunity to provide me with those exhibits.

What happened?

MS. BRASWELL: They were logged in today.

THE COURT: Huh.

MS. BRASWELL: They were logged in today. I had them last --

THE COURT: You brought them to court today?

MS. BRASWELL: Yes.

THE COURT: They have been filed?

MS. BRASWELL: Yes. I had them brought in today, but I did have them last week, but they weren't set up according to the standards, I suppose of the court rules.

THE COURT: Now, apart from those exhibits, is there anything more you think that you need to defend against the motion for summary judgement?

MS. BRASWELL: Time.

THE COURT: No. We all need time.

MS. BRASWELL: And, of course, like I said, I do need statistical data for a case like this, and I do need to do the research, and, I, also need to research the defendants' cases that they cited, as well as research some, in support of my own.

THE COURT: The defendants' cited those cases weeks and weeks ago, maybe two months ago.

MS. BRASWELL: I know, but being a lay person it's not very much time.

THE COURT: I've given you -- I recognize the fact that you're a lay person, and I've attempted to be patient.

MS. BRASWELL: Well I've also been on sick leave.

THE COURT: I will give you two more weeks to file the exhibits with the court.

MS. BRASWELL: They should be filed

already.

THE COURT: I haven't seen them.

MS. BRASWELL: I had them brought in today, so they should be here.

THE COURT: I will still give you two more weeks.

Well, it will have to be three weeks.

We will continue the motion for summary judgement to Monday, November, 19, 1990, a 2:30 p.m.

MS. BRASWELL: May I say something else?

My former attorney was supposed to have deposed at least two people. Only one of whom she deposed, and I guess not long ago got the results of that particular deposition. It wasn't that much in depth. It was nothing I could use for statistical data or anything like that, and from what I have heard, you have to, at least, give the defendant 30 to 40 days to respond to interrogatories or whatever or anything that you ask, and so I can't see how three weeks would really do that much good.

THE COURT: The point is there's been a substantial passage of time.

MS. BRASWELL: Not since I have been serving in pro per, it hasn't.

THE COURT: Your attorney made his last appearance on August the 6th.

MS. BRASWELL: Yes. August 6.

THE COURT: That is a substantial period of time.

MS. BRASWELL: For a lay person?

THE COURT: I will give you another two weeks to file whatever -- you may file whatever you wish to file. Anything. Just dish up the evidence for me, so, I can see it.

MS. BRASWELL: Will I be able to send out interrogatories to the defendant, and get some response, and depose the other person that --

THE COURT: If you can make an arrangement with the defendant to waive time. You probably might.

But you may have the two weeks to respond to the summary judgement motion that's been on file now for about two months.

MS. BRASWELL; Two months is not very much for a lay person without the legal knowledge.

THE COURT: We're getting towards the end of the road.

MS. BRASWELL: I know, but it seems like I got into this thing less than a month before the trial date, and I don't think that was fair to me, and without being able to get the evidence from the attorney, whatever, and some of the material, and some other things. Some of the dates were not filed that she should have filed herself, and then there were impending dates, week- by- week since then, and so I've been running to the Court, et cetera, and having others run to the court for me to file documents to, et cetera et cetera et cetera.

And it's just, I mean, that takes up an awful lot of time, and two months -- and I can't see how three more weeks really is going to help me, so far as getting the statistical data and what not, that I want.

THE COURT: Well, I don't want to debate it with you. The time has, essentially, run out. You have requested on previous occasions time to retain counsel. It has happened.

MS. BRASWELL: I have been seeking counsel.

THE COURT: The last time you were

here, you wished to file certain documents, certain items of evidence. That was continued for one moth to allow you to do that. Apparently, that hasn't been done.

So, you have the benefit of three more weeks to gather whatever you need to gather to oppose the motion for summary judgement.

MS. BRASWELL: So, there is no way that that can be postponed further than three weeks?

THE COURT: No. I'm not going to postpone it more than three weeks.

MS. BRASWELL: So, that is the final length of time?

THE COURT: That will be the day I consider the motion for summary judgment.

MS. CUNNINGHAM: If I may clarify, your Honor, is that two weeks in which to file additional opposition papers, and three weeks for the hearing?

THE COURT: I'm giving Miss Braswell the benefit of all of that time. We will consider anything she files up to the Friday before the 19th.

(...)

THE COURT: And if it catches you short, that's too bad. I'm giving the opportunity to file -- any time up to the end of the business day on a Friday, the 23rd.

Okay. Thank you.

THE CLERK: Your Honor, the case is also on calendar for a pretrial conference.

THE COURT: Pretrial conference is continued to the 19th of November.

(...)

(Proceedings concluded.)

(...)

DATED: 6-2-91

BEVERLY A. CASARES

BEVERLY A. CASARES CSR# 8630
Official Court Reporter

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 89-1522-JGD

ELLEN BRASWELL,
Plaintiff,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT,
Defendant.

November 26, 1990

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**ORAL PROCEEDINGS**

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(In pertinent part as follows)

APPEARANCES:

| | |
|---|---|
| FOR PLAINTIFF(S) | ELLEN BRASWELL<br>(...) |
| FOR DEFENDANT(S) | KERRY CUNNINGHAM<br>LAUSD<br>(...) |

(...)

THE COURT: All right. If you wish

to argue the motion, you may.

I think the burden falls on Miss Braswell. If you wish to argue it, I will be more than happy to listen to the argument.

MS. BRASWELL: I don't know of anything else to say, other than what I have already put in the paper, your Honor.

THE COURT: All right. I did receive your exhibits.

(...)

THE COURT: All right.

Then, it will stand submitted. I'll take it understand submission.

(...)

MS. BRASWELL: Your Honor, may I ask you one question?

THE COURT: Yes, Miss Braswell, come forward. Counsel for the school district has left, apparently.

(...)

MS. BRASWELL: I did not get a chance to read the document that he submitted to me until after he left and after he had finished.

THE COURT: Who submitted to who?

MS. BRASWELL: The clerk. After he finished, he gave me the document, and I didn't get a chance to finish reading it until after you had finished.

So, this is what I wanted to say. I don't know what the process of appeal is. I don't know -- that's the reason why I came back in is, because I don't know whether or not I'm supposed to ask you to let me reserve the right to appeal. I don't really know what the procedures in --

THE COURT: Well, the procedure for appeal is, essentially, as follows:

At the termination of the case, your rights to appeal are preserved for a period of time after the entry of the judgment.

MS. BRASWELL: Well, is this case over?

THE COURT: No, it is not over.

MS. BRASWELL: I didn't know what was going on.

THE COURT: Well, what will happen next is -- I have taken the summary judgment motion under submission. I will rule upon it, and an order will -- no matter what happens, what the result is, an order will issue, and that order will instruct you what to do, and it will also advise you whether or not the case is over.

MS. BRASWELL: Okay.

THE COURT: And that is an order, from which you have, may have a right to appeal. The order that you have reference to is in large measure an unappealable order, except, and I'll inform you of this.

Your application, excuse me, for the appointment of counsel, which is now denied a second time is an appealable order.

MS. BRASWELL: Did you say it is or isn't?

THE COURT: It is.

MS. BRASWELL: Uh-huh.

THE COURT: You may, if you choose to appeal -- if it gets to this point -- I can't tell you what's going to happen, but if it gets to the point where you wish to file an appeal, that interlocutory order is an appealable order. In other words, you can appeal my denial of your application for the appointment of counsel, and that's an application that you've made twice, and twice --

MS. BRASWELL: I'm continuing to seek an attorney. I've listed all of them. I have contacted a whole list of them, but I haven't been successful.

THE COURT: Yes. Right.

MS. BRASWELL: Okay.

THE COURT: All right. Any other questions that I can help you with?

MS. BRASWELL: I guess that's it. What is the next date for what?

THE COURT: The next order you will get, will be an order that relates to motion for summary judgement, and that will be an order that, essentially brings the procedure up to current, that brings it current.

MS. BRASWELL: Is there anything I'm supposed to do, in the meantime?

THE COURT: Nothing.

MS. BRASWELL: Okay. Just wait for that?

THE COURT: That will be mailed to you by Mr. Holmes in the near future.

MS. BRASWELL: And that will just instruct me, as to what to do?

THE COURT: That will either instruct you what to do or that will be a disposition of the case. That will end the case. You will lose the motion, and that will end the case. If you lose this motion, it, essentially, ends the case in this court.

MS. BRASWELL: Oh.

THE COURT: And you have a right to appeal from that order.

MS. BRASWELL: Okay. Thank you, your Honor.

(Proceedings concluded.)

(...)

DATED: 6-2-91

BEVERLY A. CASARES

BEVERLY A. CASARES CSR# 8630
Official Court Reporter

## U.S. CONSTITUTION, AMENDMENT XIV

In pertinent part:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## TITLE VII

## CIVIL RIGHTS ACT OF 1964 (as amended)

42 U.S.C. Section 2000e *et seq.*

(In pertinent part)

**"Section 2000e. [Sec. 701] Definitions**

"(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.

"(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c)of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(...)

"(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any

State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

"(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the

District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

"(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, and further includes any governmental industry, business, or activity."

(...)

### "Section 2000e-2. [Sec. 703] Unlawful employment practices

### "Employer practices

"(a) Employers. It shall be an unlawful employment practice for an employer--

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

"(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(...)

**"Labor organization practices**

"(c) It shall be an unlawful

employment practice for a labor organization--

"(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

"(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

"(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

**"Training programs**

"(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(...)

> **"Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions**

"(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

(...)

**"Preferential treatment not to be granted on account of existing number or percentage imbalance**

"(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

**"Section 2000e-3. [Sec. 704] Other unlawful employment practices.**

**"Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings**

"(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

**"Section 2000e-5. [Sec. 706] Prevention of Unlawful Employment Practices**

"(g) **Injunctions; affirmative action; equitable relief**

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in any unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a) [42 U.S.C. section 2000e-3(a)].

### Section 2000e-7. [Sec. 708] Effect on State Laws

"Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter."

## 42 U.S.C., Section 1981

In pertinent part:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

## 42 U.S.C., Section 1983

In pertinent part:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

## Declaration of

## Allan S. Ruttenberg, M.D.

I, Alan S. Ruttenberg, hereby declare:

I am a physician licensed by the State of California and if called as a witness could and would competently testify to the following facts from my personal knowledge:

1. I am a Diplomate of the American board of Psychiatry and Neurology and am a principal of West Hills Psychiatric Medical Group, located at 22048 Sherman Way, Suite 214, Canoga Park, California 91303. Attached hereto, labeled Exhibit 1, and by this reference made a part hereof as though fully set forth herein, is my curriculum vitae.

2. When Ellen Braswell first came to me in September of 1988, she was on an

industrial illness/injury leave and was referred to me by her family doctor. When I began seeing her in psychiatric treatment, the immediate problem to resolve was whether or not she was capable of returning to work as a teacher. She was continuing to experience, among other things, gastrointestinal symptoms, headaches, and pain in her neck and back with sciatica. During her treatments, it was obvious that she was severely depressed, anxious, and agitated. She was experiencing various symptoms which included nightmares, social withdrawal, decreased self-esteem, anorexia and fluctuations in her weight. She also was having considerable difficulty with memory and concentration and complained of insomnia, easy fatigability and irritability. Moreover, she was quite preoccupied with various discrimination (race, sex, and age) problems that she said she herself encountered with respect to job assignments and promotions at the hands of her employer, Los Angeles Unified School District, and with respect to the discriminatorily hostile work environment at Granada Hills and Polytechnic High Schools.

3. The type of treatment which I have provided Ellen Braswell has been two-fold. First, I have seen her in supportive, directive and limited insight oriented psychotherapy, aimed at trying to reduce her anxiety and agitation, improve her self-esteem, deal more effectively with her frustrations and find some way to become less affected emotionally by the poor treatment and stresses which she was subjected to at work. She has valued her psychiatric sessions and has attempted to make use of them for her benefit and

improvement. In addition, to the above-mentioned psychotherapy, and because of the severity of her depressive symptoms, I treated her with antidepressant medication for a short period to alleviate depression and anxiety symptoms.

4. I have continued to see Ellen Braswell in psychiatric treatment during her industrial illness/injury leave. Upon her attorney's (Ms. Owens-Murrell's) purported sudden substitution of herself, without prior notice to Ms. Braswell, out of Ms. Braswell's discrimination case against the Los Angeles Unified School District, Ms. Braswell went through a very traumatic depression. Her symptoms included shock, humiliation, panic attacks, diarrhea, considerable difficulty with concentration, memory problems, extreme fatigue, anxiety, major sleep disturbance, chest pains, frustration,

worry and anxiety about having to handle the case with its numerous and impending deadlines without an attorney, and about the possibility of losing the case because of her previous attorney's mishandling of it and because of having to handle it herself, a lay person in pro per and with serious health problems. Additionally, she complained of not knowing what to do, when to do it, and how and where to do or find things with respect to handling the case. She also complained of her numerous unsuccessful efforts in obtaining an attorney to handle the case.

5. Along with the above-mentioned health problems, the extremely high blood and cholesterol levels that she was laboring under and the tragic death of her daughter approximately eleven days after her attorney substituted out of the case, rendered, I believe, Ms. Braswell

incapacitate and incapable of competently handling her employment discrimination case.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 10, 1993 at Canoga Park, California.

DATED: March 10, 1993

By: ALAN S. RUTTENBERG, M.D.

Alan S. Ruttenberg, M.D.

# CURRICULUM VITAE

## Alan S. Ruttenberg, M.D.

**BORN:** Philadelphia, March 19, 1939

**HOME ADDRESS:** 19510 Weeburn Court
Tarzana, CA 91356

**EDUCATION**

| | |
|---|---|
| 1959-1963 | Attended University of Pennsylvania School of Medicine. |
| 1964-1967 | Psychiatric residency at the Neuropsychiatric Institute, UCLA |

**PROFESSIONAL DATA:**

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|---|---|
| 1967-1969 | Psychiatrist at the U.S. Naval Hospital, Philadelphia, Pennsylvania |
| 1969-present | Private practice of Psychiatry in West San Fernando Valley |
| 1969-present | Assistant Professor of Psychiatry, UCLA |
| 1969-present | Active staff member at Northridge Hospital, Humana Hospital West Hills and Nu Med Regional Medical Center |
| 1981-1982 | Chief of Psychiatry, Northridge Hospital |

| | |
|---|---|
| 1978-present | Chief of Psychiatry, Humana Hospital West Hills |
| 1970 | Certified in psychiatry by the American Board of Psychiatry and Neurology. |

**AREAS OF SPECIAL INTEREST** - Drug and alcohol treatment, depression, hospitalization for more severe psychiatric disorders, marital conflicts, panic and anxiety disorders.

# Declaration of Ellen Braswell

I, Ellen Braswell, declare:

1. I am the plaintiff-appellant-petitioner.

2. I believe that I do not qualify as indigent. However, I cannot afford an attorney to represent me for this Petition for Writ of Certiorari, so I have tried to do it as best I could without an attorney.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: September 1, 1993

BY: ELLEN BRASWELL
Ellen Braswell
Petitioner, In Pro Per